APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 19, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-56043

330 F.3d 1127; 2003 U.S. App. LEXIS 9559

February 12, 2002, Argued and Submitted,
Pasadena, California
May 19, 2003, Filed

SUZUKI MOTOR CORPORATION AND AMERICAN SUZUKI MOTOR CORPORATION,

Plaintiff-Appellant,

v.

CONSUMERS UNION OF UNITED STATES, INC., a non-profit New York Corporation,

Defendant-Appellee.

* * *

JUDGES: Before: Warren J. Ferguson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. Opinion by Judge Tashima; Concurrence by Judge Graber; Dissent by Judge Ferguson.

Appendix A

OPINION:

AMENDED OPINION

TASHIMA, Circuit Judge:

In 1988, Appellee Consumers Union of United States, Inc. (CU), published a story in its magazine *Consumer Reports*, in which it rated the Suzuki Samurai "Not Acceptable" based on its propensity to roll over during accident avoidance tests. Since that time, CU has publicly referred to the negative Samurai rating in various fora, most prominently in the 60th Anniversary issue of *Consumer Reports*, published in 1996. Appellant Suzuki Motor Corporation (Suzuki), the manufacturer of the Samurai, has challenged the validity of CU's Samurai test and, on the heels of the 60th Anniversary issue, brought this action against CU alleging product disparagement. CU's motion for summary judgment was granted by the district court, which held that a reasonable jury could not conclude by clear and convincing evidence that CU had acted with actual malice. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand for further proceedings.

I. BACKGROUND

CU is a nonprofit corporation that engages in comparative testing and evaluation of consumer products and services, the results of which are published in the magazine *Consumer Reports*. In order to provide buying and safety advice to automobile purchasers, CU's Automotive Testing Division (ATD) tests approximately 40 cars and other vehicles each year.

Appendix A

CU tested the Samurai in 1988.[1] The Samurai, a sport utility vehicle (SUV) manufactured by Suzuki, was introduced in the United States in 1985. By 1988, approximately 150,000 Samurais had been sold. Although it had received some favorable reviews from the automotive press, the Samurai had also been the subject of news stories that highlighted its instability and propensity to tip over. In February 1988, the Center for Auto Safety filed a petition with the National Highway Traffic Safety Administration (NHTSA) to open an investigation into an alleged safety defect of the Samurai. The petition was denied, although the NHTSA emphasized that the denial was not an endorsement of the safety performance of a vehicle.

A. April 20, 1988: Long-Course Testing

On April 20, 1988, the ATD tested the Samurai, along with the Jeep Cherokee, Isuzu Trooper II, and Jeep Wrangler, on its standard long course, a double lane-change avoidance maneuver test course that CU had used since 1973.[2] The long

1. As Suzuki points out, around this time CU made a significant financial outlay in order to secure a new headquarters building in Yonkers, New York. This outlay of approximately $ 30 million placed CU in what the district court termed a "financially overextended" position.

2. The long-course maneuvers followed preliminary testing on the Samurai. CU notes that during the evaluation and break-in process, Alan Hanks, the Facilities Manager of the ATD, rolled the Samurai on a snow-covered gravel road at 15 miles per hour. During the formal test ride on April 7, 1988, CU driver Kevin Sheehan reported that the Samurai was "by far the worst ride in my 20+ years at CU."

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course was designed to replicate an emergency situation in which a driver suddenly steers a vehicle left into the opposing lane, to avoid an obstacle, and quickly back into the original lane to avoid oncoming traffic. Several CU personnel were in attendance during the April 20 testing, including Robert Knoll, the head of the ATD, Dr. R. David Pittle, CU's Technical Director and Senior Vice-President, and Irwin Landau, the Editorial Director of *Consumer Reports*, who had been assigned as the initial writer and editor of the Samurai article. Pittle had invited Landau to attend the testing because he thought that they might witness a tip-up of the Samurai.

CU driver Kevin Sheehan drove the Samurai first, putting it through the long course 16 times at speeds reaching over 50 miles per hour. The Samurai that Sheehan drove was equipped with outriggers, which essentially act as training wheels to prevent the car from tipping over completely.[3] During Sheehan's runs, the Samurai did not tip over, prompting Sheehan to make the following evaluation of the car: "rubbery, slow response, rocks a bit, but never felt like it would tip over." In the Avoidance Maneuver Data Summary, Sheehan rated the Samurai as highly as or better than other vehicles tested that day.

(Cont'd)

Sheehan also took the Samurai on a one-day trip test on April 11, 1988, after which he noted that the Samurai should be rated "Not Acceptable." In addition, as Suzuki notes, preliminary research had been conducted for the Samurai story prior to the initiation of long-course testing.

3. Suzuki contends that the outriggers allowed CU to achieve dramatic results during the tests without risking a real rollover.

Appendix A

After Sheehan had completed his testing, CU removed the outriggers. CU driver Rick Small then drove the Samurai through the long course 21 times at speeds similar to those achieved by Sheehan. Again, there were no tip-ups. In his driver log, Small stated: "steering is slow, but it works—responds well and corrects quickly, leans normally, snaps back. Confidence fairly high. No real problem." On the basis of his test drives, Small rated the Samurai higher than the other three vehicles tested that day.

According to testimony by former CU employee Ron Denison, at some point during the long-course testing, which had not demonstrated any tip-ups of the Samurai, Landau told Sheehan: "If you can't find someone to roll this car, I will."

After Sheehan and Small had completed their test runs, Pittle, who was not a test driver, began to drive the Samurai through the long course. According to Pittle, he did so because he had never driven a small SUV and wanted to get a feel for how it handled through the course. Pittle took the car though the course 10 times, achieving a top speed of 49 miles per hour. On Pittle's tenth run, the Samurai tipped up on two wheels. Pittle stated that he did not purposefully cause the Samurai to tip up and that it was a startling and unexpected occurrence. When Pittle tipped the car, one onlooker yelled, "yeah!," while another shouted, "I think I got that, I think I got that."

B. April 26, 1988: Short-Course Testing

After the long-course testing, Knoll redesigned CU's avoidance course to replicate the situation that caused the

Pittle tip-up. This new modified short course had a reduced distance for the first lane change, and the obstacle to be avoided was moved three feet to the left.

Sheehan, who was afraid to drive the Samurai through the short course, was replaced by CU driver Fred Wood. Wood, who drove the vehicle with outriggers, made 15 runs through the course. On the fifteenth run, the Samurai tipped up onto the outriggers. After this last run, Knoll is heard on the test videotape saying: "That's it. That looked pretty good." Knoll later acknowledged that he was "relieved" that the Samurai tipped up during short-course testing.

Small then drove the car through the short course. On his second run, the Samurai tipped up onto the outriggers at a speed of 40 miles per hour. After the tip-up occurred, CU technician Joseph Nappi can be heard on the test videotape saying, "[a]ll right Ricky baby."[4] That same day, CU also put the Jeep Wrangler and Isuzu Trooper II through the short course with no tip-ups reported.

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4. Suzuki emphasizes CU's submission of what it characterizes as a "false" affidavit in connection with Nappi's statement. CU employees Hanks, Sheehan, Wood, Nappi, and Knoll submitted an affidavit stating that it was Denison, not Nappi, who could be heard on the videotape saying "All right, Ricky baby" after Small tipped the Samurai on April 26, 1988. Nappi later admitted, however, that he in fact made the statement. Suzuki suggests that the affidavit was submitted in an effort to discredit Denison, who had testified that Landau threatened to find someone to roll the Samurai after the April 20, 1988, long-course testing. CU proffers a benign explanation for Nappi's changing his story. Resolution of this dispute, however, is not critical to our decision.

C. May 12, 1988: Additional Short-Course Testing

Further testing was scheduled on the short course for May 12, 1988. The parties offer conflicting justifications for why this set of tests was necessary. Suzuki suggests that the additional testing was scheduled for the purpose of shooting video footage of the Samurai for a subsequent press conference, at which it had already been decided that CU would rate the Samurai "Not Acceptable." CU contends that the testing was held to evaluate the performance of the newly released 1988 Samurai, which included suspension modifications that distinguished it from the 1988 version tested previously.

Small was the first to drive the Samurai through the short course on this day, tipping over onto the outriggers on his fifth run. Following Small, Wood tipped the Samurai on his second run. Pittle was watching the test runs and, prior to witnessing a tip up, stated: "Can't you just see it, we get no lift off the ground. Oh God." CU also put a Jeep Wrangler, Jeep Cherokee, and Ford Festiva sedan through the short course on May 12. None of these vehicles tipped up.

D. June 2, 1988: Press Conference

CU held a press conference on June 2, 1988, at which it announced that the Samurai had shown a propensity to roll over in CU's tests and that it would be rated "Not Acceptable" in an article to appear in the July 1988 issue of *Consumer Reports*. During the press conference, Pittle stated that, based on CU's testing, the Samurai had an "unusually high propensity to roll over while performing an accident

avoidance maneuver that could be demanded suddenly of any driver during routine driving." Pittle further described the short course as "benign," involving only "very limited steering inputs," a characterization he later conceded was "not accurate." Pittle also stated that the other tested vehicles had made it through the short course with a "yawn," a statement that Suzuki contends is at odds with the fact that the Isuzu Trooper II failed the course in three out of four runs by hitting cones.[5]

E. July 1988: Article Publication

CU's negative rating of the Samurai was detailed in an article entitled, "Warning: The Suzuki rolls over too easily," published in the July 1988 issue of *Consumer Reports*. The article was initially written by Landau, although drafts were reviewed by Pittle, Knoll, the ATD staff, CU's President Rhoda Karpatkin, CU's Technical Department and Library, and legal counsel.

The article described the steps CU took to test the Samurai, Jeep Wrangler, Isuzu Trooper II, and Jeep Cherokee. It began by recounting the incident in which an ATD staff member rolled the Samurai over on its side during the evaluation and break-in process. After detailing other evidence of the Samurai's safety problems, the article then described the long-course testing, noting that Pittle, "a staff member who does not normally drive the course," tipped the

5. Suzuki also argues that CU deliberately excised footage of the Isuzu Trooper II's runs from the videotape screened at the press conference to downplay the fact that the Trooper also had trouble making it through the course.

Samurai at 45 miles per hour after making "a slight steering misjudgment" that should not have "put daylight under the tires of any car." The article continued by highlighting the results of both short-course tests, concluding that "that *Suzuki Samurai* is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore judge it Not Acceptable."

On June 2, 1988, CU submitted to NHTSA a copy of the article, the videotape from the press conference, and a diagram of its short course in support of a petition to establish a minimum stability standard to protect against unreasonable risk of rollover.

F. NHTSA Report

On September 8, 1988, NHTSA issued a decision denying the motor vehicle defect petition filed earlier by the Center for Auto Safety. In its analysis, the NHTSA stated that "the rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles."[6] Denial of Motor Vehicle Defect Petitions, 53 Fed. Reg. 34,866 (Sept. 8, 1988). It concluded that the Ford Bronco II "was found to have more than 3 times the first event rollover . . . involvement as the Samurai" and that "the Samurai had a first event rollover involvement corresponding to the [Chevrolet] S-10 Blazer." *Id.*

NHTSA's opinion also criticized CU's testing protocols, stating as follows: "The existing test procedures for assessing

6. On September 25, 1996, NHTSA denied a second Samurai defect petition on similar grounds. Denial of Motor Vehicle Defect Petition, 61 Fed. Reg. 50,372 (Sept. 25, 1996).

the rollover propensity of vehicles are unsatisfactory because they do not provide for repeatable, reproducible results, and there are no accepted performance criteria. The testing appears to rely on the skill and influence of the driver and the presumption that the vehicle suspension, tire, and road surface characteristics will remain constant throughout the testing." 53 Fed. Reg. at 34,867. NHTSA concluded by stating that, although the CU testing results were "cause for some concern," "the test procedures do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data. Using the same procedures, probably any light utility vehicle could be made to roll over under the right conditions and driver input."[7] *Id.* CU issued a subsequent article in *Consumer Reports* criticizing the NHTSA decision.

G. 1988-1996: CU's Republications of the Samurai Report and Further Rollover Claims

Between 1988 and 1996, CU republished references to the 1988 Samurai rating on at least 24 separate occasions in *Consumer Reports*, CU's annual buying guide, and other editions of CU's car books. During this time, CU states, several events bolstered its belief in the correctness of its "Not Acceptable" rating: a 1988 England-based Consumers' Association article that buttressed the Samurai rollover claim;

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7. In its summary of the test results on multipurpose vehicles, Britain's Department of Transport similarly concluded that the "results from the modified Consumer Union tests were unpredictable" and that "[d]river influence is greatest in the modified Consumer Union manoeuvre." Dep't of Transp., Stability of Multi-Purpose 4-Wheel Drive Vehicles (Dec. 16, 1988).

a 1988 lawsuit filed by seven state Attorneys General charging Suzuki with false and misleading advertising regarding the Samurai's rollover potential (the case settled); the decision in *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 375 (S.D. Ga. 1991), in which the court suggested that Suzuki knew of the Samurai's rollover propensity and did nothing to correct it; two separate multimillion dollar verdicts in the case of *Rodriguez v. Suzuki Motor Co.*, where juries determined that the Samurai was unreasonably dangerous due to its rollover propensity (both verdicts were reversed and the case settled); the disclosure of documents from the *Malautea* and *Rodriguez* cases suggesting that Suzuki knew of the Samurai's rollover propensity; and eight years of further SUV testing by CU during which time only the Samurai in 1988 and Isuzu Trooper in 1996 tipped up.

H. January 1996: 60th Anniversary Issue of Consumer Reports

In its 60th Anniversary issue of *Consumer Reports*, published in January 1996, CU set forth a chronology that contained a picture of the Samurai tilted on two wheels, with the following caption:

> 1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to

> power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable.

The same January 1996 issue also contained a section entitled "Memo to Members," in which CU's President stated that "we still find products that are unsafe: From kerosene heaters to the *Suzuki Samurai* to child safety seats, CONSUMER REPORTS has called them out—and our work goes on."[8]

I. April 1996: Suzuki Files This Action

On April 11, 1996, Suzuki filed the instant action alleging that CU's ongoing publication of the negative Samurai rating constituted product disparagement.[9] After discovery, CU moved for summary judgment, challenging the sufficiency of Suzuki's evidence that CU had acted with actual malice in its reporting on the Samurai. The district court granted CU's motion and entered judgment in its favor. Suzuki timely appealed.

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8. In November 1995, CU published a car buyers guide on CD-Rom that also reiterated the "Not Acceptable" rating from its July 1988 *Consumer Reports* article.

9. After the action was filed, CU continued publicly to refer to the Samurai test, citing the "Not Acceptable" rating in a June 1996 *Consumer Reports* article on SUVs; sending out contribution solicitation cards in August and October 1996 with a photograph showing the Samurai tipped up on two wheels; and referring to the Samurai in a 1996 press conference and article about the Isuzu Trooper.

II. STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). This court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). We must therefore determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Devereaux*, 263 F.3d at 1074.

Because this case implicates the First Amendment protections of a media defendant in the context of product disparagement, "[t]he appropriate summary judgment question is whether a reasonable jury could find, by clear and convincing evidence, that [the plaintiff] has shown actual malice." *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998). In answering this question, we "must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991). "[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in [its] favor. If [the plaintiff] does so, there is a genuine issue of fact that requires a trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The dissent contends that, by applying the well-established summary judgment rules to the actual malice issue

on summary judgment, we offend the "independent examination" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). This argument, however, conflates the summary judgment standard of review with application of the *New York Times* standard and, as a result, impermissibly weighs the evidence at the summary judgment stage. Under the independent examination rule, we "exercise our independent judgment" in evaluating the lower court's opinion, rather than granting it any deference. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). In other words, we review the district court's decision de novo. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) ("We review the district court's finding of actual malice de novo."); *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) ("First Amendment questions of 'constitutional fact' compel us to conduct a *de novo* review." (internal quotation marks and brackets omitted) (quoting *Bose*, 466 U.S. at 508 n.27)). This does not mean, however, contrary to the dissent's suggestion, that in the process of exercising our independent judgment, we jettison the procedural rules governing summary judgment when reviewing the grant of summary judgment in First Amendment cases. While it is true that we must independently examine the record when reviewing the grant of summary judgment, starting with *Anderson v. Liberty Lobby*, the Court has been clear that we apply the well-established summary judgment rules to review of the actual malice issue:

> Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the

> trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Anderson, 477 U.S. at 255-56. *See also Masson*, 501 U.S. at 520 ("On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence."). And, as we have noted above, our case law also recognizes the application of the normal summary judgment standards to the actual malice issue. *See Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082, 1087 (9th Cir.), *cert. denied*, 154 L. Ed. 2d 443, 123 S. Ct. 557 (2002); *Kaelin*, 162 F.3d at 1039. Thus, contrary to the dissent's suggestion, the independent examination rule of *New York Times* is consistent with our well-established procedural rules governing review of summary judgment motions on the actual malice issue and does not require us to discard the procedural rules designed to preclude the resolution of disputed factual issues at the summary judgment stage.[10]

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10. The cases cited by the dissent do not require otherwise. *See Andersen v. McCotter*, 100 F.3d 723, 725 (10th Cir. 1996) (Cont'd)

Thus, although the dissent provides a plausible view of the evidence—that CU acted in good faith as a skeptical consumer watchdog should—it is not our role, at this stage, to take sides in this way. As we discuss below, there is also another plausible view of the summary judgment record—that CU "rigged" a test to achieve a predetermined result in order to serve its own pecuniary interests. Because a jury would be entitled to believe the latter view of the evidence, Suzuki's case survives summary judgment, even applying the independent examination standard.

(Cont'd)
(affirming that "[s]ummary judgment is appropriate when there is no genuine issue as to any material fact"); *Secrist v. Harkin*, 874 F.2d 1244, 1251 (8th Cir. 1989) ("To withstand a motion for summary judgment, a public official or public figure must present evidence to support a jury finding that he or she has shown with convincing clarity that a defendant acted with actual malice."); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 838 F.2d 1287, 1293 (D.C. Cir. 1988) ("The question for the court is 'whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.'" (quoting *Anderson*, 477 U.S. at 257)); *Herbert v. Lando*, 781 F.2d 298, 305 (2d Cir. 1986) (affirming summary judgment standards).

Similarly, CU also misstates the applicable standard of review, contending that the normal summary judgment standard does not apply. The cases on which it relies, however, all involve the review of a judgment rendered after trial. *See Bose*, 466 U.S. at 510-11; *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 669 (9th Cir. 1991); *Eastwood*, 123 F.3d at 1252. Thus, these cases do not, as CU suggests, require that we abandon the established standard of review in the summary judgment context.

III. ANALYSIS

The parties do not dispute that for Suzuki to recover in this case, it must, as a public-figure plaintiff, prove by *clear and convincing evidence* that CU published disparaging statements about the Samurai with *actual malice*.[11] *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (stating that claims for product disparagement "are subject to the same first amendment requirements that govern actions for defamation"); *see also Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 66 F. Supp. 2d 1117, 1124 (C.D. Cal. 1999); *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 78 Cal.Rptr.2d 627, 637 (Ct. App. 1998); *cf. Bose*, 466 U.S. at 513 (assuming without deciding that proof of actual malice is required in a product disparagement action brought by a public-figure plaintiff against a media defendant). Actual malice requires a showing that the defendant made a false statement "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988);

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11. Suzuki accepts the actual malice formulation of the product disparagement standard for the purposes of this appeal, although it suggests that the Supreme Court has left this issue open, *see Bose*, 466 U.S. at 513, and reserves the right to challenge the standard on further review. *Amicus* Washington Legal Foundation devotes a substantial portion of its brief to arguing that the First Amendment does not demand a showing of actual malice for product disparagement claims. We decline, however, to address an issue raised only by an *amicus*. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n.1 (9th Cir. 1998) ("Generally, we will not consider on appeal an issue raised only by an amicus.").

accord Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989).

This Court has interpreted *Harte-Hanks* as providing two different tests for proving reckless disregard. *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 900 (9th Cir. 1992) (*Masson II*):

> Where the jury has proof that a publisher "actually had a high degree of awareness of probable falsity," that alone will establish that it "in fact entertained serious doubts as to the truth of [its] publication." Where such direct proof is missing, the jury may nevertheless infer that the publisher was aware of the falsity if it finds that there were "obvious reasons to doubt" the accuracy of the story, and that the defendant did not act reasonably in dispelling those doubts . . . . As *Harte-Hanks* points out, "[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category."

Id. (quoting *Harte-Hanks*, 491 U.S. at 688, 692) (brackets in the original).

Suzuki argues that the district court erred in concluding that a reasonable jury could not find that CU's statements regarding the Samurai met the actual malice standard. It contends that the evidence is sufficient to sustain a jury verdict under either test articulated in *Masson II* for proving CU's reckless disregard of the truth.

Appendix A

A. Awareness of Probable Falsity

Suzuki first contends that a reasonable jury could find by clear and convincing evidence that CU had a high degree of awareness of the probable falsity of its statements about the Samurai. It argues that there is a sufficient evidentiary basis showing that CU knew that the Samurai did not tip up more easily than other SUVs and essentially rigged its testing to produce a predetermined result.

At the outset, CU raises a general challenge to Suzuki's argument, suggesting that the overwhelming weight of the evidence demonstrates the skill and dedication of CU in researching and publishing the Samurai story, and therefore militates against any finding of actual malice. CU assails Suzuki for taking "a few facts out of context, which it pieces together in a contrived and inherently implausible fashion without any supporting evidence." It argues that this court should reject Suzuki's arguments as conjectural and places great weight on its own assertions that it absolutely believed in the truth of its statements.

In the summary judgment context, this argument is unconvincing. It is true that CU has offered evidence of its accuracy in reporting the Samurai story—or, at least, in its subjective belief that it accurately reported the story. But its characterization of its own evidence as overwhelming and its disparagement of Suzuki's evidence as out of context begs the question that we must resolve. The fact that CU employees believed in the truth of their negative statements about the Samurai cannot, by itself, defeat summary judgment. *See St. Amant v. Thompson*, 390 U.S. 727, 732, 20 L. Ed. 2d

262, 88 S. Ct. 1323 (1968) ("The defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true."); *Solano*, 292 F.3d at 1087 ("we have yet to see a defendant who admits entertaining serious doubt about the authenticity of an article it published"). Rather, the issue is whether there is adequate evidence to support the contrary view—namely, that behind the veneer of accuracy, CU was disseminating the Samurai story with knowledge, or reckless disregard, of its falsity. While it may be true that CU's evidence of meticulous reporting ultimately has more weight than Suzuki's evidence of actual malice, that is not a question to be resolved here. *See Anderson*, 477 U.S. at 249.

Turning to the evidentiary basis for Suzuki's claims, Suzuki contends that there is sufficient evidence that CU "rigged" the tests to produce the rollover result, demonstrating its awareness of the probable falsity of the negative Samurai rating. In support of this argument, Suzuki highlights the testimony of Denison, who stated that Landau, after witnessing Sheehan and Small's clean runs through the long course, said: "If you can't find someone to roll this car, I will." After this comment was allegedly made (and after Sheehan and Small had taken the Samurai through 37 long-course runs without incident), Suzuki notes that Pittle, who was not a CU test driver, decided to drive the Samurai, tipping the vehicle after 10 runs to a cheer from a CU onlooker.[12] Suzuki also points to the fact that CU modified the long

12. The record does not indicate whether 10 runs was predetermined by the testing protocol or whether Pittle simply stopped making further runs after achieving a tip-up.

course, which it had used since 1973, to replicate the Pittle situation and then resumed its testing of the Samurai until it tipped up—again eliciting statements that can be construed as expressions of satisfaction ("That's it. That looked pretty good." "All right Ricky baby.").

This evidence is adequate to preclude summary judgment. A reasonable jury could find by clear and convincing evidence that CU sought to produce a predetermined result in the Samurai test. The timing of the course modification, the fact that the Suzuki was tested repeatedly until it tipped, and the reactions of CU employees all support such an inference. A permissible inference of reckless disregard follows from this evidence of "rigged" testing—if CU modified the course in order to cause a rollover, a reasonable jury could find that the truthfulness of any subsequent reports was vitiated.

Although it suggests that the facts have been taken out of context, CU does not seriously challenge Suzuki's argument of rigging. CU does question Suzuki's reliance on the Denison testimony, arguing that he had a high regard for CU's ethical standards and did not believe that anyone involved in CU's testing of the Samurai rigged the results. Denison did testify, however, that while he believed CU was honest 99.9 percent of the time, the 0.1 percent that he was excluding was the 1988 test of the Samurai. Moreover, although CU has its own interpretation of why it modified the long course and retested the Samurai, we, of course, cannot credit that interpretation over Suzuki's at the summary judgment stage. The district court did not give adequate credit to this evidence of test-rigging.

Suzuki also contends that evidence of CU's avaricious motives supports an inference of actual malice. It suggests that the evidence reveals that CU was financially overextended due to capital investments in the period leading up to the Samurai report and needed a blockbuster story to raise CU's profile and increase fundraising revenues. It is not disputed that, at the time of the Samurai story, CU had incurred substantial debt for a new headquarters and that CU has used the Samurai story in its fundraising solicitations.

CU characterizes Suzuki's financial motive argument as an "unsupported accusation" and states that, instead of increasing revenues, CU's pre-publication press conference about the Samurai test actually decreased its sales of *Consumer Reports*. CU further contends that evidence of financial motive does not support a finding of actual malice under the relevant case law. *See Harte-Hanks*, 491 U.S. at 667 ("Nor can the fact that the defendant published the defamatory material in order to increase its profits suffice to prove actual malice."). The district court adopted this argument in granting summary judgment.

We agree with Suzuki, however, that the district court erred in this regard. There is sufficient circumstantial evidence of a financial motive to support the ultimate conclusion of actual malice. While CU is correct that financial motive cannot, by itself, prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry. *See Harte-Hanks*, 491 U.S. at 668; *Kaelin*, 162 F.3d at 1042. The evidence of financial motive dovetails with the evidence of test-rigging described above. The fact that CU needed to boost its revenues to complete its capital campaign

lends credence to Suzuki's contention that CU rigged the Samurai testing to produce the predetermined rollover result.

We conclude that the evidence of motive and test-rigging, in combination, is sufficient to preclude summary judgment and therefore requires reversal.[13]

B. Purposeful Avoidance

Suzuki also argues that there was sufficient evidence for a jury to have concluded under *Masson II* that, in the face of obvious reasons to doubt the accuracy of its Samurai story, CU did not act reasonably in dispelling those doubts, thereby raising the inference that CU knew of the story's falsity. Under this approach, "[i]t is not . . . the failure to act reasonably in itself that establishes malice; that failure is only a link in the chain of inferences that could (but need not) lead a jury to conclude that the publisher failed to conduct an investigation because it was already pretty much aware

13. Suzuki also advances a number of additional arguments in support of its contention that the summary judgment record is sufficient to show that CU acted with a high degree of awareness of the probable falsity of its report on the Samurai. Specifically, Suzuki contends that a jury could draw the inference that CU acted with actual malice based on the factual inaccuracies in the Samurai story; CU's premeditation in publicizing false statements about the Samurai; and CU's concealment of evidence contrary to its claim that the Samurai "rolls over too easily." Because the analysis set forth above is dispositive of the first prong of the *Harte-Hanks* test ("a high degree of awareness of probable falsity"), we need not reach Suzuki's remaining arguments in support of reversal based on *Harte-Hanks*' first prong.

of the falsity." *Masson II*, 960 F.2d at 900. The central inquiry is whether the evidence discloses that a defendant purposefully avoided the truth. *Id.*

First, Suzuki claims that CU had reason to doubt its assertion that the Samurai's rollover propensity warranted a "Not Acceptable" rating. In particular, Suzuki points to the NHTSA decision issued in September 1988 indicating that the Ford Bronco II had a three times greater rollover record than the Samurai, which had a rollover record corresponding to the Chevrolet S-10 Blazer. Additionally, CU learned in 1989 that the Samurai's rollover rate was less than the rollover rate of the Nissan Pathfinder, Toyota 4 Runner, Jeep CJ-7, and Ford Bronco II. Further, in 1992, the Insurance Institute for Highway Safety produced a report showing that the Samurai had a rollover rate lower than that of many other SUVs.

Second, Suzuki contends that CU had sufficient reasons to doubt the validity of the testing procedures it used to determine the negative Samurai rating. Here Suzuki again relies on the NHTSA study criticizing CU's testing procedures for failing to provide a basis for repeatable results and being overly dependent on driver influence. Suzuki also emphasizes the British Department of Transport study echoing these conclusions, as well as statements by Knoll and Sheehan suggesting that at least some CU personnel acknowledged that its testing procedures were overly driver-influenced. Suzuki asserts that, despite these indications that the Samurai rating rested on questionable data and suspect methodological premises, CU took no steps to engage in further investigation, thereby reinforcing the inference of

purposeful avoidance. Suzuki faults CU for failing to incorporate instruments into its testing that would record how the driver was steering the vehicle and for never evaluating its test results against real-world crash data. It suggests that CU's failure to do so violated accepted journalistic standards[14] and raises the inference that CU ignored contrary evidence that would confirm the falsity of its claims about the Samurai. The district court rejected much of this evidence, stating particularly that the NHTSA study was not entitled to greater weight than any other study or opinion regarding testing methods and therefore could not support a claim of actual malice.

In response to the NHTSA report, CU published an article in the November 1988 issue of *Consumer Reports* that addressed the NHTSA's critique of CU's negative Samurai rating. With respect to the issue of the Samurai's rollover rate, CU stated:

> According to NHTSA's own Crash Avoidance Research Data file, however, the *Suzuki Samurai*'s rate of rollover in single-vehicle accidents is more

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14. Relying on expert witness testimony, Suzuki asserts that CU violated accepted journalistic standards in failing to engage in further investigation of contradictory evidence. CU responds that the expert testimony is irrelevant because it is not probative of CU's subjective state of mind. *See, e.g., Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994). Although expert testimony regarding CU's departure from accepted professional standards is not sufficient by itself to establish actual malice, *see Harte-Hanks*, 491 U.S. at 669, it does shed light on the propriety of CU's response to contrary rollover evidence and, thus, is entitled to be given appropriate weight.

than double the average for all sport-utility vehicles. In 1986, the most recent year for which there are figures, the *Suzuki* rolled over in 64 percent of all single-vehicle *Suzuki* accidents reported in this data base. The only vehicle that came close to the *Samurai* in rollover involvement is the now-discontinued *Jeep CJ-5* (49 percent). By contrast, the rollover rate for full-sized sedans was only 8 percent.

NHTSA appears to have relied not on its statistics on rollover rates for single-vehicle accidents but on a different data base, one that includes only rollovers involving a *fatality*. Elsewhere, . . . [the NHTSA] notes that the *Samurai* was involved in six fatal rollovers per 100,000 vehicles on the road, a record the agency compares favorably with that of the *Ford Bronco II*—19 fatal rollovers per 100,000 vehicles on the road.

CU has learned that the overall rollover rate for the *Bronco II* is high—about the same as that for the *Jeep CJ-5*—but not nearly as high as the *Suzuki*'s. The higher number of *fatalities* in *Bronco II* rollovers could come about for a number of reasons. The *Suzuki* rolled over at a relatively low speed in our accident-avoidance tests; if *Bronco II* rollovers occurred at higher speeds, one would expect more fatalities per rollover. One would also expect more fatalities if the *Bronco II* were driven more miles, on average, than the *Suzuki*.

Appendix A

Regarding the NHTSA's criticisms of CU's testing protocols, the article went on to state:

> NHTSA did no independent testing of the *Suzuki*'s rollover propensity. Rather, it uncritically accepted Suzuki's data, saying Suzuki "demonstrated that the Samurai satisfactorily completed industry accepted . . . tests which might be used to assess a vehicle's rollover propensity."
>
> But there are no industry-accepted tests for rollover propensity—a point NHTSA itself makes elsewhere in its letter . . . .
>
> [One] test performed for Suzuki looks superficially like an avoidance maneuver, since the car was run through a slalom course. But in a realistic avoidance maneuver, a car is steered first to the left and then back to the right immediately. In the Suzuki test, the car was steered to the left, then straightened and allowed to recover before returning to the right lane. That is a simple lane-changing maneuver, not an accident-avoidance maneuver.
>
> NHTSA also adopted as its own another of Suzuki's arguments: Using the accident-avoidance maneuver developed by CU, the agency stated, "probably any light utility vehicle could be made to roll over." But NHTSA offered no evidence or independent test results to support such

> speculation. In fact, no vehicle other than the *Suzuki* has rolled over in the 10 years we've tested for accident avoidance.

The critical inquiry under *Masson II* is whether CU failed to act reasonably in investigating and responding to contrary studies in a manner that suggested it was attempting purposefully to avoid discovering the truth of the matter. In general, the analysis conducted and published by CU in response to the NHTSA study is not indicative of purposeful avoidance. To the contrary, in the November 1988 article, CU challenged the NHTSA report head on, stating its disagreement in detail and supporting its alternative conclusions with substantive justifications. To the extent that there were contrary rollover statistics, CU analyzed them and explained why they did not warrant a conclusion at odds with its initial assessment of the Samurai. In response to the NHTSA's critique of CU's testing, CU argued that the Suzuki tests upon which the NHTSA relied were flawed. While Suzuki may disagree with CU's discussion of the rollover statistics or its criticisms of Suzuki's own accident avoidance tests, such disagreement does not demonstrate CU's purposeful avoidance of critical facts.

While we agree with CU, however, that much of Suzuki's purposeful-avoidance argument boils down to its disapproval of CU's conclusions, there is one issue that nevertheless precludes summary judgment here. In particular, CU has done nothing to respond to the criticism of its testing procedures as overly influenced by driver input. This evidence formed the basis for the district court's decision in *Isuzu Motors*, in which the court relied heavily on the NHTSA report to deny

CU's summary judgment motion, stating that "CU was aware that its tests were significantly reliant upon driver input and skill." *Isuzu Motors*, 66 F. Supp. 2d at 1125. Suzuki has pointed to further evidence that some CU personnel shared this assessment. The issue is whether CU, armed with the knowledge that its tests were potentially flawed in this way, failed reasonably to investigate in such a manner that could lead a jury to conclude by clear and convincing evidence that CU was aware of the falsity of its Samurai report. Drawing all reasonable inferences in favor of Suzuki on this point, CU's failure to address this deficiency with its testing procedure could lead a jury to conclude that it was aware that doing so would disclose the falsity of its negative Samurai rating.

Therefore, we conclude that Suzuki has also raised a genuine issue of material fact as to whether CU purposefully avoided information that would have undermined its assessment of the Samurai's rollover propensity.

IV. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is reversed and the case remanded for further proceedings.[15]

REVERSED and REMANDED.

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15. We, of course, intimate no view of the ultimate outcome on the merits.

CONCUR BY: Susan P. Graber (In Part)

CONCUR: GRABER, J., concurring in part:

I agree with the majority opinion's theoretical discussion but agree only in part with its application of our standard of review.

A. *Standard of Review*

The majority opinion employs the proper standard of review. Although the independent examination rule applies at the summary judgment stage, it does not require us to abandon all the usual summary judgment procedures. Instead, we are required to examine independently the entire record in determining whether the nonmoving party has presented evidence sufficient to allow a reasonable jury to conclude, by clear and convincing evidence, that a public figure has proven actual malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998).

At the summary judgment stage, the independent examination rule does not allow us to end our analysis by noting that there is "some" or "any" evidence in the record giving rise to a genuine issue of material fact, as we would be permitted to do in a run-of-the-mill civil action. The First Amendment requires us to graft the more demanding "clear and convincing" standard onto our traditional summary judgment analysis and requires us to consider independently whether the non-moving party has presented sufficient

evidence to satisfy this demanding standard. But we still are required to view the evidence in the light most favorable to the nonmoving party, and we are prohibited from deciding questions such as credibility, which remain reserved exclusively for the factfinder. *Anderson*, 477 U.S. at 255.

The dissent points out that the "clearly erroneous" standard of Rule 52(a) does not apply to some findings of fact made after a full trial in a First Amendment case. 292 F.3d at 1085 (Ferguson, J., dissenting) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984)). Rather, in First Amendment cases, reviewing courts undertake an independent examination of the record to determine whether the judgment constitutes "a forbidden intrusion on the field of free expression." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). The dissent argues incorrectly that we ignore this directive in our application of the summary judgment standard.

The dissent's interpretation of the independent examination rule would require us to abandon a fundamental tenet of summary judgment procedure, namely, viewing the evidence in the light most favorable to the nonmoving party. None of the cases cited by the dissent requires us to take this drastic step. In fact, the Supreme Court's post-*Bose* decisions clearly illustrate that, whatever the independent examination rule means in the summary judgment context, it does not mean that we must abandon our practice of viewing the evidence in the light most favorable to the nonmoving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to

be drawn in his favor."); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991) ("On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence."); *see also Kaelin*, 162 F.3d at 1039, 1041 (holding that the court "must draw all justifiable inferences in favor of [the nonmoving party], including questions of credibility and of the weight to be accorded particular evidence," and that the court is required to "[v]iew[] the facts in the light most favorable to [the nonmoving party]" (internal quotation marks omitted)). Thus, it is clear that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

There are good reasons why courts must apply the independent examination rule differently in the summary judgment context than when reviewing a judgment entered after a full trial. The evidence presented at trial often differs markedly from that which is offered in a party's summary judgment papers. The propositions claimed in affidavits may or may not be proved at trial. Some witnesses turn out to be credible; some do not.[1] Some inferences that seemed tenuous

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1. In this case, the credibility of a number of CU's employees is of paramount importance to the "actual malice" inquiry. Further, were the jury at trial to disbelieve those employees' explanations of statements made during the testing process, this court could not question the jury's finding. *See Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (noting that the independent

(Cont'd)

at summary judgment appear quite reasonable in light of the evidence at trial. Even in the First Amendment context, therefore, summary judgment cannot serve as a complete substitute for trials on the merits in all cases. As the Supreme Court stated in *Anderson*:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. *It by no means authorizes trial on affidavits.* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

477 U.S. at 255 (emphasis added). Accordingly, when reviewing a summary judgment ruling on the question of actual malice, we must apply the independent examination

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(Cont'd)

examination rule "does not mean we give jury findings no weight; on questions of credibility, which the jury is uniquely qualified to answer, we defer."); *see also Bose*, 466 U.S. at 498, 499-500 (noting that the independent examination rule is consistent with Federal Rule of Civil Procedure 52(a)'s mandate that "'due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'"). Accordingly, viewing the evidence in the light most favorable to the nonmoving party at summary judgment is particularly important in cases such as this one, where the jury could choose to disbelieve the testimony of the moving party's witnesses.

rule differently than we would if we were reviewing an actual-malice finding made after a full trial.

B. *Actionable Statements*

I must part company with the majority opinion, however, on the question of which statements are actionable. There are dozens of allegedly actionable statements in this case. Both the majority and the dissent analyze these statements as a whole, using an all-or-nothing approach. I believe that each statement must be considered separately against the standard outlined above.

Under this analysis,[2] only two of the statements withstand CU's motion for summary judgment.

1. The first of these appeared in an August 20, 1996, CU Background Paper: "In 1988, we developed the "short course" *because we discovered* that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver." (Emphasis added.) The evidence detailed in the majority opinion is sufficient to allow a rational jury to find, by clear and convincing evidence, that CU developed the short course *before* discovering a rollover "propensity" and *in order to create* a rollover propensity, not *because of* it.

2. The second potentially actionable statement appeared in CU's January 1996 anniversary issue: "1986 CU buys its

2. Suzuki's claims are untimely with respect to many statements. Others fail to meet the exacting summary judgment standard used in a First Amendment case.

own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS *discovers that the Suzuki Samurai easily rolls over in turns* and rates it Not Acceptable." (Emphasis added.) The evidence in the summary judgment record would allow a reasonable jury to find by clear and convincing evidence that what CU discovered was that the Suzuki Samurai did *not* roll over "easily" in turns, but had to be coaxed.

For the reasons explained here and in the majority's opinion, Suzuki has presented sufficient evidence to allow a reasonable jury to conclude, by clear and convincing evidence, that CU made those two statements with actual malice. Summary judgment with respect to those statements was inappropriate.

DISSENT BY: Warren J. Ferguson

DISSENT: FERGUSON, Circuit Judge, dissenting:

I respectfully dissent. By failing to apply the full procedural protections afforded by the First Amendment, the majority and concurrence intrude on the field of free expression in two of its most important contexts: consumer protection and public safety.

In *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), the Supreme Court held that specific constitutional protections of speech limit the state's power to award damages in libel actions brought by public officials. *Id.* at 283. One method of protecting speech is the actual malice standard, which is set forth by the majority opinion. Majority Op. at 6498-99; *see also New York Times*, 376 U.S. at 285-86. Another method is the independent examination rule, which requires an appellate court to independently review the whole record, "so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 (citation omitted). In adopting the actual malice standard and independent examination rule, the Supreme Court noted the importance of protecting "the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *Id.* at 270. The Court also recognized that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space they need [] to survive." *Id.* at 271-72 (internal quotation marks and citation omitted).

The majority and concurrence undermine these procedural protections by erring in their application of both the actual malice standard and the independent examination rule.

1. Independent Examination

The majority and concurrence misunderstand the argument of Consumers Union of United States, Inc. ("Consumers Union") that we must conduct an independent examination of the record under *New York Times*. Majority Op. at 6495 & n.10. While purportedly applying the "independent examination rule," both the majority and concurrence fail to grasp how the *additional* procedural protection of the independent examination functions and, thus, are unable to apply the rule properly in this case. Moreover, both Judge Tashima and Judge Graber overlook the ongoing debate among courts and legal scholars regarding the applicability of the "independent examination" rule to appeals from summary judgment motions, commentary which clarifies the significance of the independent examination rule in our analysis at the summary judgment stage.[1] Because the majority and concurrence have demonstrated a limited understanding of the independent examination rule, I provide a brief overview below.

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1. *See, e.g.*, Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431, 2432, 2442-45 (1998); Scott Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 215, 289-97 (1987); Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 Am. U.L. Rev. 3, 50-91 (1985). The debate among the circuits is discussed further below.

Appendix A

From the outset, it is worth noting that prior to our decision in *Crane v. Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992), it was an open question within our circuit whether the independent examination rule applied to appeals from summary judgment. Even after *Crane*, the Supreme Court has recognized that the scope of procedural protections in First Amendment cases remains unclear. *Waters v. Churchill*, 511 U.S. 661, 671, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (recognizing that, although "some procedural requirements are mandated by the First Amendment, and some are not[,]" the Court has not "discovered a general principle to determine where the line is to be drawn.").

However, the application of the independent review rule to a summary judgment determination is the most logical method to address the concerns regarding the chilling of speech expressed in *New York Times*. *See* 376 U.S. at 278 ("Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."). As a practical matter, the threat and actual cost of litigation, including attorneys fees, inhibit speech. *See id.* at 278-79; *see also Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 n.76 (3d Cir. 1980) ("The cost of litigating a libel action, burdensome on even the largest news organizations, often can cripple smaller news operations."). At times, the costs of a successful defense can be the same or greater than what the damage awards would have been. *See* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 Am. U. L. Rev. 3, 38 (1985). Moreover, the defense costs *prior* to trial can be extraordinarily high. *See id.* at 91.

Because of these costs and their effects on speech, the procedural protection of the independent examination rule is necessary not only for appellate review of post-trial decisions, but also for appellate review of summary judgment decisions.[2] The independent examination rule provides an additional level of protection of the media's First Amendment rights. Moreover, it addresses concerns regarding the chilling effects on speech of successive, costly litigation. *See Steaks Unlimited, Inc.*, 623 F.2d at 280 ("Regardless whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster [the goals of] the First Amendment . . . .").

Unfortunately, *Crane* notwithstanding, the applicability of the independent review rule to appeals from summary judgment remains uncertain within our circuit. *See, e.g., Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998) (failing to discuss the applicability of the independent review rule). While in the instant case the majority and concurrence grudgingly concede that the independent examination rule applies, this concession is

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2. In her partial concurrence, Judge Graber contends that "[t]here are good reasons why courts must apply the independent examination rule differently in the summary judgment context than when reviewing a judgment entered after a full trial." Concurrence at 6510. However, Judge Graber's analysis fails to consider the purpose and intent of a summary judgment motion, particularly in a First Amendment case. In First Amendment cases, we must be aware of the dangers associated with the cost of litigation which can stifle expression, particularly by those whose interests are in warning of danger to the public safety.

empty. Their analysis differs in no meaningful respect from an ordinary summary judgment appeal, thereby stripping the independent examination rule of its intended purpose and meaning. I would find that a correct application of the independent examination rule to the facts before us reveals that the plaintiff's case must fail on summary judgment. There is simply insufficient evidence in the record as a whole that could support a reasonable jury finding that the plaintiff has shown actual malice on the part of Consumers Union by clear and convincing evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

2. Applying the Procedural Protections Mandated by *New York Times*

The majority and concurrence incorrectly apply the actual malice standard and undermine the importance of independent review. By doing so, Judges Tashima and Graber permit a forbidden and dangerous intrusion on the field of free speech.

Both Judges Tashima and Graber fail to contextualize Consumers Union's testing of the Samurai within the purpose and mission of the organization. The District Court recognized the importance of doing so when it stated: "The trier of fact could not be expected to disregard the nature of defendant's business—testing and reporting on consumer products—nor would plaintiff so urge, and it would be error for a court to so instruct. Thus, it is clear that, based on the information CU had gathered, it was concerned about the safety of the Suzuki Samurai." Viewed in this context, the

actions and words of Consumers Union were appropriate. Consumers Union began its investigation of a product with the assumption that it could or might be unsafe. Once the product had performed in a manner that could be deemed unsafe, Consumers Union tested it more rigorously. Although the events that occurred in this case suggest that Consumers Union's representatives had the intractable, "bulldog" mentality of a consumer advocacy organization, the facts do not evince actual malice as required by the law.

Judge Graber parts with the majority when she concludes that only two of Consumers Union's statements are potentially actionable. With respect to the first statement,[3] Judge Graber notes that "[t]he evidence detailed in the majority opinion is sufficient to allow a rational jury to find, by clear and convincing evidence, that CU developed the short course *before* discovering a rollover 'propensity' and *in order to* create a rollover propensity, not *because of* it." *Id.* at 6512. Because Judge Graber does not specify the evidence she believes supports a finding of actual malice with respect to this statement, and because Judge Tashima does not analyze Suzuki's claims sentence by sentence, I can only infer that Judge Graber is referring to the fact that Consumers Union altered the course, as well as the comments made by Consumers Union employees during the testing. This evidence is insufficient to support a finding of actual malice, let alone by clear and convincing evidence. At most,

3. The first statement by Consumers Union that Judge Graber finds potentially actionable is: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver." Concurrence at 6512.

the comments of Consumers Union's employees give rise to an inference of bias against the Samurai.[4] Bias alone, however, cannot support a finding of actual malice. *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995).

Moreover, the fact that Consumers Union altered the course cannot supply the "something more" that is required by the exacting actual malice standard. Not only is it undisputed that Consumers Union disclosed the alteration in the article, it is also undisputed that the Samurai tipped over prior to Consumers Union developing the short course. Consumers Union's proffered reasons for developing the short course are completely consistent with the benign explanation that they were simply seeking confirmation of the existing accusations of rollover propensity against the Samurai, which it had exhibited in the early stages of testing.[5]

This is not a case in which Consumers Union contrived to make the Samurai roll over. Suzuki admits that there had been four independent lawsuits in which the vehicle rolled over, including one lawsuit by the Attorneys General of seven states. Certainly, when choosing to republish references to the rating, numerous rollover instances such as these reaffirmed Consumers Union's opinion that the vehicle was

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4. The statements identified by Judge Tashima are as follows: (1) "If you can't find someone to roll this car, I will." (2) "That's it. That looked pretty good." (3) "All right Ricky baby." Majority Op. at 6501.

5. It is undisputed that the Samurai tipped during the break-in period, as well on the long course when it was driven by an inexperienced driver.

"Not Acceptable." In short, the undisputed evidence reveals no evidence of actual malice with respect to the first statement that Judge Graber finds potentially actionable.

The second statement that Judge Graber identifies as potentially actionable is as follows: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS *discovers that the Suzuki Samurai easily rolls over in turns* and rates it Not Acceptable." Concurrence at 6512. Judge Graber states that "[t]he evidence in the summary judgment record would allow a reasonable jury to find by clear and convincing evidence that what CU discovered was that the Suzuki Samurai did *not* roll over 'easily' in turns, but had to be coaxed." *Id.* Because Consumers Union disclosed the basis of the statement, the word "easily" was merely a properly made characterization of the Samurai's performance during the testing. *See Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) ("Thus, we join with the other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."). Moreover, even if reasonable minds differ about whether the Samurai tipping over four times on an altered course constitutes "easy" rollover propensity, this is evidence only of a subjective word choice, not of actual malice as the First Amendment requires.

Judges Tashima and Graber also misconstrue my argument, contending that I apply the independent

examination rule in a manner that swallows the summary judgment standard, and thus engage in a forbidden intrusion on the province of the fact finder. Majority Op. at 6595-97; Concurrence at 6509-10. Their accusations reveal their lack of understanding of the way the rule interacts with the summary judgment standard, and the analysis that the rule requires that we apply in First Amendment cases. Were we to apply both standards correctly, we would determine whether there is a genuine issue of material fact as to actual malice under the summary judgment standard. However, in doing so, we would conduct an independent review of the entire record "to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 505; *see also Secrist*, 874 F.2d at 1251 (stating that a court must "make [its] own independent review of the record to ensure the principles of actual malice are constitutionally applied."). Because the independent examination rule allows us to view all of the evidence, and not just that which favors the plaintiff, we give maximum protection to the First Amendment. Far from discarding traditional summary judgment rules, my analysis is consistent with the way the independent examination rule has been applied at the summary judgment stage by other circuits. *See, e.g.*, *Secrist*, 874 F.2d at 1251; *Herbert*, 781 F.2d at 305, 308. Like in *Secrist* and *Herbert*, upon an independent review, the evidence of actual malice in the case before us is paltry and unable to survive a summary judgment motion.

On a broader level, the majority's decision has troubling implications. If taken to its logical end, the majority's reasoning will allow *any* deficiency in a consumer group's test to become the grounds for litigation. This will inhibit the speech of organizations and individuals who would fear voicing their findings and views because of the threat of litigation. *See New York Times*, 376 U.S. at 278-79. Suppression of such speech will create less informed consumers and hinder public safety and health. *See Steaks Unlimited, Inc.*, 623 F.2d at 280 (discussing the importance of First Amendment protection for consumer reporting). Moreover, it will give the government the sole voice in this field. In cases, such as this, where the consumer organization disagrees with the government agency's findings or where the agency criticizes the organization's findings, companies will be able to use this fact as proof that the organization was acting with actual malice.[6]

The law is certain that in order to hold Consumers Union is not protected by the First Amendment, there must be clear and convincing evidence that it acted with actual malice toward Suzuki. The appropriate standard on summary judgment in First Amendment cases is not simply whether there are disputed issues of material fact; the test is whether or not a reasonable jury could find by clear and convincing evidence that Suzuki proved actual malice on the part of

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6. This concern is most likely part of the reason that the District Court stated that the NHTSA study was not entitled to greater weight than any other study or opinion regarding testing methods. The majority, however, chooses to give the NHTSA study greater weight and, thus, discourages the non-governmental voices in the fields of consumer protection and vehicle safety. Majority Op. at 6507.

Consumers Union. Here, no reasonable jury could find clear and convincing evidence of actual malice. *See Kaelin*, 162 F.3d at 1039. After an independent review of the record, it is unquestionable that the District Court constitutionally applied the principles of actual malice. The grant of summary judgment was necessary both to avoid the inhibition of free speech by the media and to protect public safety and health. For these reasons, I would affirm the District Court's decision.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 19, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-56043

330 F.3d 1110; 2003 U.S. App. LEXIS 9565; 2003 Cal. Daily Op. Service 4131; 2003 Daily Journal DAR 5336

May 19, 2003, Filed

SUZUKI MOTOR CORPORATION AND AMERICAN SUZUKI MOTOR CORPORATION, Plaintiff-Appellant, v. CONSUMERS UNION OF UNITED STATES, INC., a non-profit New York Corporation,

Defendant-Appellee.

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JUDGES: Before: Warren J. Ferguson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. KOZINSKI, Circuit Judge, with whom PREGERSON, REINHARDT, T.G. NELSON, HAWKINS, THOMAS, McKEOWN, WARDLAW, W. FLETCHER, FISHER and BERZON, Circuit Judges, join, dissenting from denial of rehearing.

Appendix B

OPINION:

ORDER

The opinion and dissenting opinion, filed June 25, 2002, slip op. at 9009, 292 F.3d 1192, are withdrawn and replaced by the amended opinion, concurring opinion, and dissenting opinion filed concurrently with this order. With these amendments, the panel has voted to deny the petition for rehearing en banc, with Judge Ferguson recommending that the petition be granted.

The full court was advised of the petition for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a majority of the nonrecused active judges failed to vote in favor of en banc rehearing.*

The petition for rehearing en banc is denied.

DISSENT:

KOZINSKI, Circuit Judge, with whom PREGERSON, REINHARDT, T.G. NELSON, HAWKINS, THOMAS, McKEOWN, WARDLAW, W. FLETCHER, FISHER and BERZON, Circuit Judges, join, dissenting from denial of rehearing en banc:

For over half a century, Consumers Union has been testing and rating consumer products and publishing the

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* Judge Rawlinson was recused.

results in its magazine, Consumer Reports. A significant portion of the American public relies on CU's ratings on a regular basis, and almost everyone consults Consumer Reports now and then before making a significant purchase—whether a sound system, a dishwasher or a car. What makes CU's ratings particularly useful is the thorough explanation of the testing procedures employed, which lets consumers judge whether the ratings fairly represent the product.

The Suzuki Samurai article, the subject of this lawsuit, is no exception. Running some 6500 words, it tells readers precisely how CU came to conclude that "The Suzuki rolls over too easily," starting with an incident during the vehicle's break-in period where the Samurai "flopped over on its side" during a low-speed maneuver. The explanation is not written for morons; like other CU reviews, it is geared to an intelligent, informed consumer. Yet the careful reader will not fail to understand the central facts that undergird Suzuki's claim in this lawsuit, namely, that the Samurai did well on CU's standard course, that CU then modified the course to make it more challenging and, as a result, the Samurai did far worse than its competitors.

I find it incomprehensible that a review truthfully disclosing all this information could be deemed malicious under *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). If CU can be forced to go to trial after this thorough and candid disclosure of its methods, this is the death of consumer ratings: It will be impossible to issue a meaningful consumer review that a band of determined lawyers can't pick apart in front of a jury. The ultimate losers will be American consumers denied

access to independent information about the safety and usefulness of products they buy with their hard-earned dollars. The majority sets a dangerous precedent, and the full court errs grievously by failing to take the case en banc to correct the error.

1. The majority's analysis is tainted throughout by its failure to articulate, much less apply, a coherent theory of the "independent examination" rule, a key element of the *New York Times* regime. When a public figure sues his critics for defamation, we "must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285 (citation omitted). This rule "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984). It is "a rule of federal constitutional law" that "reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11.

We have heretofore sensibly assumed that the independent examination rule calls for us to do something more than we would normally do. After all, it hardly "preserve[s] the precious liberties established and ordained by the Constitution" to treat a First Amendment case the same as a slip-and-fall. When we review a jury verdict under *New York Times*, we don't "independently examine" the record merely by considering all the evidence—we already

do that in every case anyway. *See Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) ("[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record."). Nor do we merely review de novo the trial judge's determination whether a jury question exists—again, we already do that in every case. *See Janes* v. *Wal-Mart Stores Inc.*, 279 F.3d 883, 886 (9th Cir. 2002) ("We review a district court's denial of a motion for judgment as a matter of law *de novo* . . . ."). First Amendment independent examination is an *additional* protection that the Constitution affords publishers.

Where there are genuine evidentiary disputes over particular factual predicates of actual malice—such as questions about a witness's credibility—the issue is for the jury. The judge does not weigh the evidence to find those historical facts, but instead makes a routine sufficiency determination. *See Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). After resolving the predicate factual disputes in the plaintiff's favor, however, the judge must take the further step of independently "determin[ing] whether the record establishes actual malice with convincing clarity." *Bose*, 466 U.S. at 514; *see Eastwood* v. *Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997).[1] And *that* process is not a routine sufficiency determination,

1. Independent examination is, of course, a one-way street: If the jury *rejects* a plaintiff's claim, a judge may not invoke the rule to resurrect it.

because it *does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.

The majority ignores these principles and instead treats the rule as nothing more than de novo review of the trial judge's sufficiency ruling. On this theory, independent examination is exactly what we do whenever we consider a trial judge's determination that a case does not present a triable issue. Of course, de novo review in this sense actually hurts CU because the district court sided with it below.

The majority relies on *Bose* and *Hoffman* v. *Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001), for the point that independent examination means the same thing as de novo review. But those cases involved a very different use of the term: not de novo review of the lower court's sufficiency-of-the-evidence determination, but de novo review of the underlying question whether the defendant acted with actual malice. The former type of review is what we do in every case where a party appeals a grant of summary judgment or a denial of judgment as a matter of law. It's the latter type—weighing the evidence on the ultimate question of actual malice—that constitutes independent examination.[2]

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2. The majority's confusion may stem from the fact that *Bose* and *Hoffman* were appeals from bench trials. Where the district court is the fact-finder, de novo review of its opinion is also de novo review in the *New York Times* sense because it's effectively de novo review of the underlying question of actual malice. But where the district court merely makes a sufficiency determination—whether on summary judgment or post-verdict—de novo review of its opinion is *not* de novo review in the *New York Times* sense. We always review sufficiency determinations de novo; independent examination means doing something more.

Appendix B

The majority seems willing to concede that independent examination has some bite after the verdict. But it refuses to "conflate[]" this post-verdict standard with the summary judgment one. Am. op. at 6495. By decoupling the two standards, the majority conflicts directly with Supreme Court precedent. As the Court explained in *Anderson*, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." 477 U.S. at 249. Because the court must ultimately review a plaintiff's verdict under the independent examination rule, it necessarily follows that it must apply that same standard at summary judgment.

The practical effect of the panel's decision is that our review for sufficiency at summary judgment is now governed by one standard, while our review after a jury verdict is governed by another. Cases will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict under *New York Times*. What possible purpose is served by conducting such mock trials? Are they held just in case new evidence materializes mid-way through trial? Or merely to give the lawyers trial experience? I know of no other context where we allow a plaintiff to get to trial with a factual record that will not support a verdict in his favor.[3]

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3. Judge Graber is of course correct that "[t]he evidence presented at trial often differs markedly from that which is offered in a party's summary judgment papers." Concurrence at 6510. That a plaintiff defeats a summary judgment motion doesn't guarantee that the evidence at trial will support a verdict in his favor. What's novel about the majority's approach is that it reverses the rule: It lets a plaintiff defeat summary judgment with a record inadequate to support a verdict, on the mere speculation that some evidence at trial—as yet unknown—will materialize to support his case.

The omnipresent danger in defamation suits is that "would-be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279. That a plaintiff's suit ultimately fails after trial is little solace to a defendant crushed by the sheer expense of litigation. For example, in this suit and a similar one filed by Isuzu, *see Isuzu Motors Ltd.* v. *Consumers Union of U.S., Inc.*, 66 F. Supp. 2d 1117 (C.D. Cal. 1999), Consumers Union had by September 1999 reportedly spent more than $10 million defending its ratings, while its two adversaries had spent more than $25 million. *See* John O'Dell, *Bruising Tests Await Consumer Reports in Court*, L.A. Times, Sept. 19, 1999, at A1. And these are just two of the many lawsuits CU has had to contend with—about a dozen published cases (and who knows how many unpublished ones) involving disgruntled CU reviewees seeking revenge through the courts. Good for lawyers, but not so good for free expression.

It's no answer to let the chips fall and assume that insurance will cover the tab. Insurance makes costs more predictable, but it doesn't decrease the amount publishers must pay to do business in the long term. If publishers present a greater liability risk, insurers will charge higher rates. The burden on free speech is no less intolerable.

Even when First Amendment values do not hang in the balance, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are

designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting Fed. R. Civ. P. 1). That principle is all the more vital where a slow and expensive determination will result in self-censorship.

Where a plaintiff's evidence is strong enough to support a verdict, the publisher must stand trial. But there is no sensible reason to impose such onerous costs on a publisher where the plaintiff is doomed to fail. Allowing a plaintiff to get to trial on a record that will not support a verdict under *New York Times* does not make sense, and if some of the Court's precedents can be read to suggest this result, the Court would do us all a great favor by explaining that it intended no such absurdity.

2. Had the majority applied the constitutionally required standard, it could not have reached the result it did.[4] Suzuki's case is easily summarized. Its first theory is that CU knew it was probably lying because its employees tried to make the Samurai tip and were happy when they succeeded. The second is that CU purposely avoided the truth by failing to address a potential source of experimental error. Neither of these theories withstands serious scrutiny.

As to the first, the majority relies heavily on the fact that CU switched to the short course after the long course failed to cause any tips. The initial problem with this theory

4. I use the term "majority" loosely because Judge Graber never tells us which parts of Judge Tashima's opinion she relies on to find actual malice.

is that CU fully disclosed this in its article. Just so we're clear what we're talking about, here's what CU told the public:

> Our regular test program includes a maneuver designed to see how controllable a car remains when a driver is forced to steer sharply—to avoid, say, a child who unexpectedly darted into the road. To simulate that kind of sudden emergency, our drivers run each car through a lane-changing course marked off by traffic cones. The drivers begin their left turn out of the lane 60 feet before the obstacle. They then must steer sharply enough to get back into the lane no more than 60 feet beyond the obstacle.
>
> . . . .
>
> Under the experienced touch of our drivers, all four utility vehicles got through the course at 52 mph or better. The *Suzuki Samurai* was actually more maneuverable than the others, since it's so much smaller and lighter.
>
> With concern about a potential rollover somewhat allayed, a staff member who does not normally drive the course tried to steer the *Suzuki* around the obstacle. All went well for several runs at moderate speed. Then, on a run at 45 mph, the driver made a slight steering misjudgment: He turned wider than necessary to clear the obstacle, something many ordinary drivers might

do in an emergency turn. That forced him to turn back a bit more sharply than our regular testers had. As he turned the steering wheel to the right to get back into lane, the *Suzuki* teetered to the left. The two right-side tires lifted about a foot off the pavement before the driver was able to bring the vehicle back under control.

. . . .

Would the other utility vehicles show similar instability if steered the way the *Suzuki* had been steered?

To find out, we put all the vehicles through a slightly different maneuver. We realigned the cones so that our test drivers had to start the turn 50 feet from the obstacle instead of 60 feet from it. That meant they needed to steer around the obstacle and back into lane in a total of 110 feet rather than the usual 120 feet. We also moved the obstacle three feet farther to the left.

. . . .

In this more demanding test, the *Isuzu Trooper*, the *Jeep Wrangler*, and the *Jeep Cherokee* began knocking over cones at about 40 mph. But they remained stable. We also tried the *Jeep Wrangler* without the outriggers. Still stable.

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> The *Suzuki Samurai*, by contrast, toppled onto the outriggers when turned through the course at about 40 mph. Without the outriggers, it would have rolled over.
>
> During the period we were testing these vehicles, Suzuki introduced a modified version of the *Samurai*, a "1988 1/2" model with a softened suspension. We acquired the latest version and ran it through the same accident-avoidance maneuver. It proved even less stable than the *Samurai* we originally tested. The front right wheel lifted in turns at low speed. And the vehicle rolled onto the outriggers at 38 mph.[5]

CU thus thoroughly explained both its track design and its testing procedure. It acknowledged that the Samurai did well on the standard course and alerted the reader that CU designed a new course specifically to force a maneuver it had reason to believe the Samurai would fail. Even assuming CU wanted to make the Samurai tip and designed its short course to achieve that result, so what? The fact remains that the Samurai *did* tip—several times—while every other vehicle run through the same course did not tip even once. This is certainly something consumers would want to know before deciding which of these vehicles to put their families in.

By exposing CU to liability for basing its negative opinion of the Samurai on a fully disclosed testing procedure,

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5. The introductory explanation to the article is reprinted in full in the appendix.

the majority runs head-first into a settled First Amendment principle: "'Where a publication sets forth the facts underlying its statement of opinion . . . and those facts are true, the Constitution protects that opinion from liability for defamation.'" *Standing Comm.* v. *Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (quoting *Lewis* v. *Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983)); *see also Partington* v. *Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) ("[W]hen a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment."). The logic behind the rule is straightforward and unassailable: When a publisher prints an opinion but doesn't state the basis for it, the reader may infer a factual basis that doesn't exist. *See Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20-21, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990). But when a publisher accurately discloses the facts on which he bases his opinion, the reader can gauge for himself whether the factual basis adequately supports the opinion.

This is not a case where a defendant fabricates results and then purports to rely on them—like when NBC secretly strapped rockets to GM trucks with side-mounted fuel tanks to make them explode in collisions. *See* Jane Hall, *Chief of NBC News Quits in Wake of Rigged Crash*, L.A. Times, Mar. 3, 1993, at A1. There's not a shred of evidence that the short course was clandestinely altered to make it more forgiving when the other vehicles went through, or that CU's drivers intentionally soft-pedaled the runs with the other vehicles to make the Samurai look worse by comparison. The majority's gripe here is not with CU's reporting of its tests, but with its experimental design, and that is entirely the wrong focus. If CU had found the Samurai "Not Acceptable" based on

tests performed with a Ouija board, most consumers would dismiss its rating as worthless. But, so long as CU disclosed its method, the report would be protected by the First Amendment.

Even aside from the fact that CU fully disclosed its change in course, there is simply nothing improper about what it did. When CU first tested the Samurai on the long course, it didn't tip—a result consistent with the theory that it is safe, but also consistent with the theory that the long course is not challenging enough to detect the Samurai's design flaw. CU did what any conscientious researcher would do and redesigned its experiment to focus on the conditions that seemed more likely to detect a flaw. *See, e.g.*, Karl R. Popper, *The Logic of Scientific Discovery* 45 (Hutchinson rev. ed. 1968) (1934) (noting that a scientist, after first detecting a condition, "might try to rearrange his experiments so as to make the effect reproducible"). It then ran the Samurai and several other vehicles through the course and found that the Samurai had a dramatically higher propensity to roll over—it tipped on several occasions while no other vehicle tipped once.

The opinion makes much of the fact that CU had used its long course for testing since 1973, but cites no evidence it was using the course for *rollover* testing during that time. In fact, the evidence in the record suggests the contrary: None of the 500 vehicles CU had previously tested had rolled over, and it did not even use safety outriggers to protect its drivers from rollovers until the tests in question. Clearly, CU had not previously focused on this particular risk, no doubt because the original test course was designed before SUVs

and similar vehicles with high centers of gravity had come into vogue. But after news stories and a NHTSA filing highlighted the Samurai's rollover propensity, after the vehicle rolled over once during break-in, and after it tipped *again* following formal testing on the long course, CU had good reason to change focus. Adjusting test procedures to better detect a risk arising from new consumer preferences is hardly reprehensible. It is precisely what one would expect from researchers seriously interested in consumer safety.

Consider an analogy: Assume CU has been testing clothes dryers using a standard load since 1973. It learns that a particular brand of dryer occasionally causes fires. CU dries several standard loads but experiences no adverse results, so it tries a few loads with more flammable materials—say, acetate bed-linens. This is not part of its existing testing protocol, but the materials are ones that consumers have begun to use more often in recent years. If the materials catch fire in the one dryer but not the others, is CU's test a fraud because it changed its procedure to focus on the new risk?

The relevant question in either case is not whether the new procedure is different from the old, but whether it accurately reflects conditions consumers might occasionally face. And the majority points to no evidence at all on *that* score. The short course was not some extraordinary challenge that no consumer vehicle could be expected to pass—after all, every other tested vehicle did pass it. CU's previous use of the long course has no bearing on whether its short course results were fraudulent.

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By equating CU's switch to a short course with knowledge of probable falsity, the majority ignores the realities of experimental design. Scientific inquiry would grind to a halt if researchers couldn't tinker with their methods as they learned new information about the object of their study. CU's switch is not even bad science, let alone bad journalism, and certainly not journalism so awful that it loses First Amendment protection. To be probative of actual malice, evidence must have at least some tendency to exclude obvious innocuous explanations for the defendant's conduct. CU's switch from a long course to a short course does not.[6]

That leaves the majority with no direct evidence that CU's methods were flawed, and only four contemporaneous statements of CU employees—"If you can't find someone to roll this car, I will," an unspecified cheer, "That's it. That looked pretty good," and "All right Ricky baby"—that, to the majority, show an unfair bias against the Samurai. If CU had a negative view of the Samurai going into the tests, the reasons are not hard to imagine—the Samurai had already been slammed in the press for its rollover propensity, had been the target of a safety complaint filed with NHTSA and had rolled over on its side while a CU employee drove it at only 15 mph. But even if CU's preconception were entirely

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6. The majority also relies on the fact that the driver who made the Samurai tip the first time was not one of CU's regulars. This fact was also disclosed in CU's article, *see* p. 6466 *supra*, and, in any case, it's hard to see why it matters. Presumably, consumers driving the Samurai are typically not accredited test drivers either. Moreover, it's undisputed that the actual short course test runs, in which the Samurai tipped several times and the other vehicles didn't tip once, were all performed by CU test drivers.

arbitrary, these fleeting remarks—three of which are no more than inane schadenfreude—would still be insufficient to support a finding of actual malice.

Actual malice is not bias. "[I]ll will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 281, 41 L. Ed. 2d 745, 94 S. Ct. 2770 (1974) (internal quotation marks omitted). Speech that is "malicious" only in the sense that the speaker is biased against his target is fully protected; the First Amendment extends beyond "reasoned [and] evenhanded" commentary to the "slashing and one-sided." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 54, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988).

Bias may *support* a showing of actual malice; if you bad-mouth someone, the fact that you also don't like him makes it marginally more likely you're lying. But bias evidence is not sufficient by itself to support a claim: "[A]ctual malice may not be inferred alone from evidence of personal spite, ill will or intention to injure on the part of the writer." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 666 n.7, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989) (internal quotation marks omitted); *see also, e.g.*, *Church of Scientology Int'l* v. *Behar*, 238 F.3d 168, 174 (2d Cir. 2001); *Shoen* v. *Shoen*, 48 F.3d 412, 417 (9th Cir. 1995). If a tabloid sends an investigator to dig up dirt on a celebrity, the fact that it deliberately attempts to find damaging information and is pleased when it succeeds hardly proves it's lying. Forcing CU to stand trial for statements that show nothing more than bias ignores these settled First Amendment principles.

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We don't hold participants in public debate to Article III standards of impartiality. Nor do we second-guess their investigations as if we were reviewing administrative action under the APA. So long as they don't lie or recklessly disregard the truth, they can be as unfair and one-sided as they want. The majority's clear and convincing evidence that CU strayed beyond this wide field is shockingly thin. The Second Circuit requires a plaintiff to show that bias was coupled with "an *extreme* departure from *standard* investigative techniques." *Behar*, 238 F.3d at 174 (emphasis added). For the majority, *any* departure from *past* technique will apparently suffice, even one entirely consistent with standard experimental methodology.

What ultimately dooms Suzuki's case is that, no matter *what* CU's motives for choosing the short course, it is undisputed that the Samurai tipped multiple times on that course while the other vehicles tested didn't tip even once. If the majority has its way, evidence like this—which may make a life-or-death difference to consumers—will be suppressed for fear of precisely this type of lawsuit, waged with gale-force intensity by corporate plaintiffs with bottomless litigation budgets.

3. The majority's second ground for reversal is weaker still. After CU published its initial report, NHTSA criticized certain aspects of its methodology. CU responded, and the majority finds its response for the most part satisfactory. It concludes, though, that CU fell short by failing to address NHTSA's critique of its reliance on driver input.

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The majority's analysis suffers from familiar flaws. Even if CU's reliance on human drivers made its tests less reliable, it *disclosed* the relevant facts in its report. CU explained in detail its use of human test drivers and the precise maneuvers they performed—right down to the distance between traffic cones. *See* pp. 6466-67 *supra*. Surely these disclosures provide adequate information for readers to make a reasonable assessment of CU's testing. At the very least, they provide readers familiar with safety testing mechanics—such as NHTSA and Suzuki engineers—the information they need to assess CU's testing and come up with a public response. CU should not stand trial over a potential source of experimental error that it fully disclosed.

The majority's holding is flawed for deeper reasons as well. It faults CU for failing to "investigate" and "address" a perceived deficiency in its testing procedure. Am. op. at 6508. But what was CU supposed to do? Using human drivers obviously introduces a potential source of experimental error. But it also replicates actual driving conditions and thus captures nuances that might be missed if the experiment were performed by entirely mechanical means. If CU had built some stationary rollover machine instead, Suzuki would have complained that its failure to recreate actual driving conditions made its results unreliable. If CU had built a car-driving robot, Suzuki would have complained that the test didn't reflect the reactions of a *human* driver. All experiments have potential sources of error, and many reputable experiments rely on human input. That an experiment can be criticized on these grounds doesn't make it reckless to rely on the results, even if the criticisms have some validity.

Failure to explain away or eliminate all potential sources of error in an experiment cannot be a basis for liability.

What the majority calls "actual malice" is really just one side of a long-running debate over how to test rollover propensity most effectively. CU favors "dynamic" tests using actual drivers, while NHTSA has long preferred "static" tests based on measurements of a vehicle's geometry. While the majority thinks NHTSA has the better of this scientific debate, Congress was not so sure: In 2000, it passed a statute *requiring* NHTSA to develop a dynamic rollover testing program. Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, § 12, 114 Stat. 1800, 1806 (2000) (codified at 49 U.S.C. § 30117(c)); *see* Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Resistance, 66 Fed. Reg. 35,179, 35,180-81 (request for comments July 3, 2001) (explaining the statute's history). The TREAD Act followed on the heels of CU's criticism that NHTSA's static testing methods, although a "useful predictor of tripped rollover, . . . should be used in conjunction with a dynamic stability test using vehicle maneuvers to better predict the risk of untripped rollovers." 66 Fed. Reg. at 35,180-81. And as NHTSA concedes, the Act "reflects CU's concern." *Id.* at 35,181.

As if that weren't vindication enough, when NHTSA acted on Congress's directive, one of the dynamic rollover tests it initially proposed using was the "CU double lane change," *id.* at 35,183, the very test the majority now finds so heretical that reliance on it amounts to actual malice. NHTSA identified both the advantages of CU's test

("face validity"; "probably a good representation of what the public expects of a personal vehicle"; "better represents the dynamics that may result in an untripped rollover"; "maximum speed through the maneuver can be used as part of the vehicle score"; "display[s] the operation of electronic stability control systems") and its disadvantages ("any vehicle will pass such a test if equipped with tires of sufficiently low traction"; "driving style can strongly influence the test results"; "course layout may cause the steering reversal and roll momentum effect to be more critical for some vehicles than for others"; "a course tuned to one vehicle may not be the worst case for another vehicle to which it is compared"). Although NHTSA ultimately opted for a different set of dynamic rollover tests, those it selected still relied on human drivers and merely involved a lower number of steering inputs (one or two, as opposed to four in CU's test). *See* Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Resistance (Part II), 67 Fed. Reg. 62,528, 62,537-38 (proposed Oct. 7, 2002). NHTSA thus reduced, but did not eliminate, this potential source of error.

Surely these legislative and regulatory developments bear heavily on the disputed issues in the case. Strangely, however, the majority does not even mention them. That Congress specifically repudiated NHTSA's exclusive preference for static rollover testing shows we cannot blindly accept NHTSA's criticism of dynamic testing as evidence of actual malice. That NHTSA thought CU's test was an option worth considering twelve years later shows that it is not so off-the-scientific-map that reliance on it is tantamount to purposeful avoidance of the truth. That NHTSA ultimately chose tests that involve the same source of error, just to a lesser degree,

shows that the issue is not nearly so black-and-white as the majority paints it. On a more fundamental level, these developments show that courts have no business wading into this scientific feud over the best way to test rollover propensity. Which method gives the optimal mix of advantages and disadvantages is a point of disagreement among Congress, NHTSA, CU and others. It should be resolved by scientists, policymakers and consumers, not crushing libel verdicts.

The appropriate response to a poorly designed experiment is to conduct a better one and then convince people that your method is more accurate—not to sue the other guy into silence. The point is poignantly made by the facts of this case. For all its kvetching, NHTSA apparently never even performed its own tests on the Samurai—it relied entirely on data from Suzuki. *See* Am. op. at 6506. Suzuki's test procedures no doubt had plenty of defects of their own (the most obvious being "company conducting test has financial stake in outcome"). Can we really say the world is better off if the only source of Samurai rollover data is the manufacturer? If consumers are purchasing an SUV they will trust with their lives, aren't they entitled to know that the Samurai tipped repeatedly in human-driven tests while the other SUVs didn't tip once?

Groups like CU perform a valuable function in our consumer society, but they suffer from a constant threat of litigation. It's easy for a jury to second-guess experimental design, and every suit carries the prospect of a massive damages award because the very purpose of a negative review is to convince the reader that the plaintiff's product is not

worth buying. It's hardly surprising, then, that CU attracts lawsuits like moths to a lantern. *See, e.g.*, *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) (truly silly dispute over whether sound from plaintiff's speakers wandered "about the room" rather than merely "along the wall" litigated all the way to the Supreme Court). If Suzuki can get to trial on evidence this flimsy, no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics.

The majority's decision reaches far beyond consumer organizations to virtually any research group that criticizes corporate interests. Many public interest groups are thinly funded, and their experiments are necessarily full of imperfections. Their targets can now stuff unflattering results into a scientific oubliette just by pointing out sources of experimental error and then threatening to sue if the groups don't "investigate" and "address" them. Today it's Consumers Union panning the Samurai; tomorrow it could be Greenpeace claiming that some oil refinery is killing fish. The First Amendment doesn't allow companies to squelch their scientific detractors on evidence as thin as Suzuki's. The majority's legal regime cannot coexist with our tradition of robust scientific debate on matters of public concern.

4. Judge Graber focuses on two particular statements, but succeeds only in highlighting how deficient Suzuki's case is. She first faults CU for reporting that it developed the short course "because [it] discovered" the Samurai's rollover propensity, when in fact it developed it "in order to create" that propensity. Concurrence at 6512 (emphasis omitted).

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I don't understand how CU could have "create[d]" the Samurai's rollover propensity. A propensity is something innate to the object. Is Judge Graber suggesting that CU somehow modified the vehicle to make it more likely to tip? There is no evidence of that whatsoever. What CU did was put the Samurai through a test that *demonstrated* its innate tendency to tip, a propensity it had as a result of the way it was built. CU designed a course to develop evidence of the vehicle's propensity to roll over. It could not and did not create the propensity itself.

That problem aside, there is simply nothing false about CU's statement. There's no dispute *why* CU built the short course: As it thoroughly explained in its article, it was trying to replicate the conditions that caused the Samurai to tip when a CU employee turned too sharply on the long course. Suzuki doesn't dispute this. CU switched to the short course "because [it] discovered" a propensity to roll over during that particular maneuver, a maneuver none of the drivers had previously performed because they had all driven the long course as designed. CU's statement is an entirely accurate description of its reason for developing the short course.[7]

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7. Even if Judge Graber were right and CU somehow misled the public about its reasons for building the short course, I can't see how it could possibly matter. Whether CU built the short course for the reasons it gave or because little green men from Mars told it to do so, the fact remains that it built the course and the Samurai flunked it while every other vehicle passed. CU's motives simply are not germane to Suzuki's theory of recovery because they do not in any way defame the Samurai or contribute to any damage it may have suffered. It's as if CU claimed it conducted the tests on a Wednesday when it actually conducted them on a Friday.

Appendix B

Judge Graber also complains that CU said the Samurai rolls over "easily" when, in fact, it had to be "coaxed." Concurrence at 6512. She apparently fears that readers might assume the Samurai rolled over with no "coaxing" at all. But no one could be so misled. Even tremendously unsafe vehicles roll over only in extreme maneuvers. No one reading that the Samurai rolls over "easily" would infer it routinely flops over with no human intervention.

Saying a consumer vehicle rolls over "easily" is like saying a particular NBA player is "terrible." The adjective is inherently relative because the reference group is already extreme. A "terrible" professional athlete is one who's terrible relative to his peers, not relative to the population at large or a class of third-graders. Likewise, the mental image conjured up when one hears the Samurai rolls over "easily" is not of some oopsy-daisy clown car, but a vehicle that rolls over easily *relative to other vehicles in its class*. And, since all vehicles require *some* coaxing to roll over, Judge Graber's fear—that readers might be duped into thinking they'll come out of the supermarket to find that their Samurai had flopped itself over in the middle of the parking lot—is a specter of her own creation. Even ignoring the rollover during break-in and the tip on the long course—not to mention the NHTSA complaint and the media coverage—CU was plainly justified in concluding that, given the alternatives, the Samurai's rollover propensity was more than what safety-conscious consumers should be willing to bear. And that's exactly what any reader would understand it to have said.

Moreover, the word "easily" cannot be plucked out of context. It must be read in light of CU's article (to which the

anniversary issue obviously referred). CU explained exactly how "easily" the Samurai tipped over, and what CU did to reach its conclusion. It did not secretly put lead weights in the roof to raise the center of gravity; it did not use narrow tires to cause instability; it did not jimmy the suspension. It did exactly what it said it did—it put the Samurai through the same course as the other vehicles, and the Samurai tipped while the others did not. CU did not ask consumers to accept its claim at face value; it gave them the data on which it based its conclusion so they could decide for themselves whether or not the Samurai tipped over too easily.

Even if CU's reporting were somehow inaccurate or misleading, there are any number of legal doctrines that protect it. ("Rhetorical hyperbole" comes to mind, *see Letter Carriers*, 418 U.S. at 285-86.) But it's not. CU had adequate grounds to conclude that the Samurai rolled over easily compared to similar vehicles, and that's all it said.

Judge Graber doubtless perused the record with great care in search of something to support Suzuki's case. That she could come up with nothing better than these two statements speaks volumes about the overall accuracy and candor of CU's reporting.

* * *

I have read CU's review of the Samurai and Suzuki's criticism of its methodology. After all that, I can only say I would long hesitate before letting anyone I care about drive or ride in one of these vehicles. If Suzuki wanted me to disregard CU's conclusions, it should have taken the money

it spent on this lawsuit and hired an independent agency to run tests showing that CU's criticisms are unfounded. It could also have tried to improve its product to moot criticism in the future. But, until today, I had thought the one option not available to a company in Suzuki's position was to use its vast financial resources to drag its critics through the gauntlet of our immensely expensive litigation machine. I continue to hope I'm right, or this will be a sad day indeed for consumer organizations and those who rely on them for information vital to their health and safety.

[SEE APPENDIX IN ORIGINAL]

APPENDIX C — SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION DATED AND DECIDED MAY 24, 2000

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SA CV 96-340 AHS (ANx)

SUZUKI MOTOR CORPORATION,

Plaintiff,

v.

CONSUMERS UNION OF UNITED STATES, INC.,

Defendant.

May 24, 2000, Decided

JUDGES: ALICEMARIE H. STOTLER, UNITED STATES DISTRICT JUDGE.

OPINION BY: ALICEMARIE H. STOTLER

OPINION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (APPENDICES AND RELATED ORDERS OMITTED)

Appendix C

I.

PROCEDURAL BACKGROUND

The Court heard oral argument on defendant's motion for summary judgment on June 28, 1999. After complete review of all declarations and exhibits, as hereinafter described, review of the Reporter's Transcript of counsels' oral arguments, and additional independent research, the Court, by this Order, grants defendant's motion.

Consumers Union of United States, Inc. ("CU") filed a Motion for Summary Judgment on May 3, 1999. In support of its motion, CU filed a number of declarations,[1] as well as a Request for Judicial Notice, an Appendix of Extrajudicial Authorities, the Statement of Uncontroverted Facts and Conclusions of Law, and a proposed Judgment. Plaintiff Suzuki Motor Corporation ("Suzuki") filed its opposition on May 24, 1999. In addition to its Memorandum of Points and Authorities, Suzuki filed opposition to CU's Request for Judicial Notice, opposition to CU's documentary exhibits attached to the declarations of Baird and Williams, its Statement of Genuine Issues ("GI"), as required by Local Rule 7.14.2, objections to CU's declarations, and a number of declarations in support of its opposition.[2] CU filed its reply

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1. The declarations of Karpatkin, Pittle, Knoll, Landau, Sheehan, Wood, Small, Conkling, Allen, Nappi, Baird (attached to which are Volumes I through VI containing exhibits 1-148), and Williams (attached to which are Exhibits 149-182).

2. The declarations of Reichert, McCarthy, Cooperrider, Yarborough, Edwards, Guthman, Bottomley, Riley, Rudd, Rogers, (Cont'd)

on June 7, 1999. CU submitted exhibits 393-400 as attachments to the Supplemental Declaration of Williams. In addition, CU filed Objections to Suzuki's declarations, a Response to Suzuki's Statement of Genuine Issues, a Response to Suzuki's objections to CU's Request for Judicial Notice, a Response to Suzuki's Objections to documentary exhibits attached to the declarations of Baird and Williams, and a Response to Suzuki's objections to declarations. With leave of Court, Suzuki filed responses to CU's evidentiary objections on June 23, 1999.

On July 1, 1999, the parties were requested, via minute order, to prepare, serve, and lodge proposed orders regarding their evidentiary objections. The parties then lodged proposed orders on July 19, 1999. Having read and considered the parties' arguments in support of or against admissibility, the Court separately files today those orders which now contain the Court's rulings on the evidentiary objections. Generally speaking, most of the plaintiff's hearsay objections are overruled because many statements and documents are not offered for the truth of the matter stated but as circumstantial evidence bearing on the issue in controversy. On the other hand, many of the defendant's objections to plaintiff's declarations are sustained because the witnesses are not qualified to opine on defendant's state of mind; to the extent that the declarants state factual matter, however, their testimony is accepted.

(Cont'd)

Rasmussen, Murray, Schwartz, Goldie, Gomez, Heywood, Jacobs, Lundquist, McCloskey, Ouellette, Singley, Smith, Theis, Beasley, Garcia, O'Neal, Seidle, Strauss, Tagland, in addition to exhibits 183-392.

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In addition, the Court this date separately files, as Appendix A to Order Granting Defendant's Motion for Summary Judgment, a list of all exhibits submitted by defendant CU in support of its motion as well as its reply. The Court also separately files, as Appendix B to Order Granting Defendant's Motion for Summary Judgment, a list of all exhibits submitted on behalf of plaintiff Suzuki, all of which, whether text, photo, or video, have been reviewed by the Court. The Court has also received, read, and considered plaintiff's Notice of Recent Additional Authority Re Summary Judgment, filed September 23, 1999, and defendant's response thereto filed September 24, 1999. Having considered the parties' arguments in support of and against judicial notice, the Court denies Defendant's Request for Judicial Notice. Certain court decisions contained in the Request for Judicial Notice are otherwise admitted in connection with declarations of witnesses for limited purposes, as ruled upon in the aforementioned orders on evidentiary objections. The Court sustains Suzuki's objections to CU's Objections to Evidence Set Forth in Suzuki's Statement of Genuine Issues and grants Suzuki's request that those objections be disregarded.

II.

FACTUAL OVERVIEW

This action stems from an article that originally appeared in the July 1988 issue of Consumer Reports ("CR"), a monthly magazine published by defendant CU. In the article (Ex. 105), CU opined that the Suzuki Samurai ("Samurai") was "Not Acceptable" because CU's tests showed a tendency

for the car to roll over during an accident avoidance maneuver. Plaintiff Suzuki Motor Corp. Japan is the manufacturer of the Samurai, a sports-utility vehicle. American Suzuki Motor Corp., the American distributor of the Samurai, was originally a plaintiff but was dismissed in the order granting defendant's Motion to Dismiss on February 3, 1997.

In this action, Suzuki asserts that statements referring to the Samurai's rollover tendency, which initially appeared in the 1988 CR article and which have been repeated in various CU and other publications, are false, disparaged the Samurai, and caused Suzuki to suffer damages. While the original complaint and the supplemental complaint contained 22 claims, including defamation and libel claims, the First Amended Complaint contains only three claims, two product-disparagement claims and one claim under California Business & Professions Code § 17200. The Court denied Suzuki's Motion for Leave to File a Second Amended Complaint on April 13, 1999.

In this motion, CU challenges the sufficiency of plaintiff's evidence supporting one essential factual element of its case: whether CU acted with actual malice in reporting on the Samurai on the basis of its 1988 testing. Suzuki points to a number of facts, culled from a voluminous record compiled by both parties, that it contends support a finding of malice. Suzuki highlights the following:

1. After more than three dozen runs in the Samurai on CU's established avoidance maneuver, CU's professional drivers rated it highest of all the vehicles, and expressly stated

"no tendency to tip up" and "no real problem" in the written evaluations. See Plaintiff's Statement of Genuine Issues ("GI"), PP 440-41;

2. After the Samurai completed the standard testing without incident, CU's editor-in-chief, Irwin Landau, remarked that "If you can't find someone to roll this car, I will." Motion at 23-25; GI P 445;

3. CU's technical director, R. David Pittle, then asked to drive the Samurai. After nine more runs and after departing from the established track, the Samurai tipped up. Motion at 24-25; GI PP 452-54;

4. After the tip-up, Pittle directed the chief of CU's auto test division, Robert Knoll, to prepare a new "modified emergency avoidance maneuver" and replicate Pittle's path. GI PP465-67;

5. When driver Richard Small was able to tip up the Samurai on the new course after multiple successful runs by another driver, the test course video and audio tape recorded CU employees cheering, and someone said "All right Ricky baby!" Motion at 22; GI PP 478-83;

6. Landau drafted the article reviewing the Samurai as "Not Acceptable" before the auto test division prepared its usual report on the testing and before the runs on the modified course had been completed by the other vehicles, including one vehicle whose performance was lauded by Landau in the draft. GI PP 521-26;

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7. On the last day of testing, after Landau completed the draft and Pittle signed off on it, and CU had begun to prepare for a press conference to announce the findings, Pittle saw that the drivers were unable to tip the Samurai and exclaimed "Can't you just see it, we get no lift off the ground, Oh God!" Motion at 22; GI P 487;

8. CU refused to reconsider the validity of its testing despite the federal government's conclusion, in September 1988, that CU's "test procedures . . . do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data" and similar findings by other governments. GI P 588;

9. By 1995, CU knew that one of its former test drivers, Lee Baldrick, purchased a Samurai for his own personal use. GI PP 636-44;

10. At the time of CU's testing in 1988, CU was financially overextended due to capital investments. Motion at 20-22; GI PP 732-35.

Suzuki maintains that the totality of evidence that it has presented, and especially the foregoing excerpts, satisfies the requirements of the malice standard and justifies trial proceedings.

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III.

DISCUSSION

A. Standard of Review

To avoid an adverse grant of summary judgment, Suzuki must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 212-213, 106 S. Ct. 2505, 2511 (1986) (quoting Fed. R. Civ. P. 56(e)). The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The inquiry involved in a ruling on a motion for summary judgment necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits, i.e., the "actual quantum and quality of proof necessary to support liability" at trial. Liberty Lobby, 477 U.S. at 252, 254. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. See id.

There is no disagreement that plaintiff must prove actual malice by "clear and convincing evidence." See Plaintiff's Opposition to Motion for Summary Judgment on Issue of Actual Malice at 6. In other words, the Court must determine whether a reasonable fact-finder could conclude that the plaintiff has shown actual malice with convincing clarity.

Liberty Lobby, 477 U.S. at 252. Actual malice is a term of art denoting deliberate or reckless falsification. *See Masson v. New Yorker*, 501 U.S. 496, 499, 115 L. Ed. 2d 447, 111 S. Ct. 2419, 2424 (1991). Malice entails a showing that the defendant made a false statement "'with knowledge that the statement was false or with reckless disregard as to whether or not it was true.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, 105 L. Ed. 2d 562, 109 S. Ct. 2678, 2685 (1989) (quoting *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 56, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)). Put another way, defendant must have made the decision to publish the relevant information with a "'high degree of awareness of . . . probable falsity,'" or defendant must have entertained "'serious doubts as to the truth of [the] publication.'" *Harte-Hanks Communications*, 491 U.S. at 667 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964) and *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 88 S. Ct. 1323 (1968)).

Whether a plaintiff has shown actual malice is determined on a case-by-case basis, and the courts have a constitutional duty to "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949, 1967 (1984).

B. Application

The merits of CU's motion for summary judgment do not turn on the stability of the Samurai or even the soundness of CU's testing methodology. Rather, the issue is whether

plaintiff has satisfied its evidentiary burden of showing with convincing clarity that CU reported on the Samurai with actual malice. Having viewed all the evidence in the light most favorable to plaintiff, in making a "case-by-case" assessment by looking to all of plaintiff's evidence, and, compressing cartloads of evidence into a legal conclusion, the Court holds that plaintiff has not shown malice by clear and convincing evidence.

First, the trier of fact must necessarily view the context of CU's testing of the Samurai. The trier of fact could not be expected to disregard the nature of defendant's business — testing and reporting on consumer products — nor would plaintiff so urge, and it would be error for a court to so instruct. Thus, it is clear that, based on the information CU had gathered, it was concerned about the safety of the Suzuki Samurai. Defendant was confident that its tests would disclose road-safety dangers, if there were any. This pre-testing concern is not an impermissible mindset for a publisher, particularly one which proclaims its mission as protecting the consumer, and particularly given the background information already known about the Samurai. When the tip-up problem with the vehicle's stability appeared, defendant put the car through more rigorous tests. Plaintiff emphasizes the redesigned test (the "short course") in particular, as if defendant had irreversibly committed itself to testing all products the same, irrespective of new design or technology. All these facts, while relevant, do not evince malice as a matter of law at the requisite legal standard.

Plaintiff's reliance on CU's overextended financial status, supposedly due to its building program, is one example

of plaintiff's attempt to impute a financial motive to defendant in causing distribution of its Samurai review. While a motive in publishing material may bear on malice, the Supreme Court has settled the issue by holding that a goal of increasing one's profits through publishing material is not sufficient to prove actual malice. Harte-Hanks Communications, 491 U.S. at 667 ("If profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from New York Times to Hustler Magazine would be little more than empty vessels.").

Likewise, plaintiff does not explain why CU's difference of opinion with the National Highway Transportation and Safety Administration ("NHTSA," in the evidence)[3] over the acceptability of the driving test should compel the trier of fact to conclude that defendant is for that reason intent upon deliberate or reckless falsification. To the contrary, part of the First Amendment's protection has to do with disagreeing with the government. *See New York Times v. Sullivan*, 376 U.S. 254, 270-71, 11 L. Ed. 2d 686, 84 S. Ct. 710, 721 (1964) (Debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365, 81 L. Ed. 278, 57 S. Ct. 255 (1937)). While the NHTSA evidence is admissible in support of plaintiff's theory of its case, it is not shown to be evidence entitled to greater weight than any other study or opinion regarding vehicle testing methods.

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3. *See* 49 U.S.C. § 105(a) and 49 C.F.R. § 501.1, *et seq.* *See also Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 33, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983), discussing origin and purpose of NHTSA.

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Viewing the evidence presented through the "prism of the substantive evidentiary burden," as stated in Liberty Lobby, the Court concludes that a jury could not reasonably find that plaintiff proves its case by the quality and quantity of evidence required by governing law. Defendant is therefore entitled to judgment as a matter of law.

IV.

CONCLUSION

Accordingly and for the foregoing reasons, the defendant's Motion for Summary Judgment is granted. The Court has modified, signed, and filed defendant's proposed Statement of Uncontroverted Facts and Conclusions of Law as well as defendant's proposed Judgment.

The Clerk is instructed to file the following documents:

1. Order Granting Defendant's Motion for Summary Judgment;

2. Appendix A to Order Granting Defendant's Motion for Summary Judgment (List of Defendant's Exhibits);

3. Appendix B to Order Granting Defendant's Motion for Summary Judgment (List of Plaintiff's Exhibits);

4. Suzuki Motor Corporation's Order on Evidentiary Objections, lodged July 19, 1999;

5. Order re Defendant Consumers Union's Objections to Declarations, lodged July 19, 1999;

6. Defendant's proposed Statement of Uncontroverted Facts and Conclusions of Law, as modified by the Court;

7. Judgment for defendant.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on counsel for all parties in this action and enter the Judgment.

Dated: May 24th, 2000.

ALICEMARIE H. STOTLER

UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION FILED MAY 24, 2000 AND ENTERED MAY 25, 2000

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
[SOUTHERN DIVISION]

SUZUKI MOTOR CORPORATION JAPAN,
a Japanese corporation,

Plaintiffs,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
a non-profit New York corporation,

Defendant.

Case No. SA CV 96-340 AHS (Anx)

DEFENDANT CONSUMERS UNION'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Appendix D

Date: June 28, 1999
Time: 10:00 a.m.
Dept: Courtroom Of The Honorable Alicemarie Stotler

After consideration of the papers in support of and in opposition to Defendant Consumers Union of United States, Inc.'s ("CU") Motion for Summary Judgment and the oral argument of counsel, the Court determines that there is no genuine issue as to the following facts. Certain assertions are deleted, not because they are untrue, but because they are not relevant to this motion.

UNCONTROVERTED FACTS[1/]

BACKGROUND OF CONSUMERS UNION OF UNITED STATES, INC.

Uncontroverted Fact	**Supporting Evidence**
1. CU was founded in 1936 as a New York not-for-profit organization.	1. Karpatkin Dec., ¶¶ 12, 13.
2. The mission statement of CU is TEST, INFORM, PROTECT.	2. Karpatkin Dec., ¶ 11.

1. These facts are conceded by Defendant Consumers Union solely for the purposes of its Motion for Summary Judgment.

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BACKGROUND OF KEY CU EMPLOYEES

Uncontroverted Fact	Supporting Evidence
12. Rhoda Karpatkin is the President of CU. Karpatkin graduated from Yale Law School with an L.L.B. in 1953 and represented CU as one of its attorneys from 1958 to 1974 until becoming Executive Director/President of CU. In addition to her work for CU, Karpatkin has devoted her entire working life to public service as a lawyer, a member of a variety of consumer commissions, and as a teacher and writer.	12. Karpatkin Dec., ¶¶ 1-6; Exh.112, Exh. 113.
13. Dr. R. David Pittle is the Technical Director and Vice President of CU. Pittle holds a PhD. in Electrical Engineering from the University of Wisconsin. From 1969 to 1973, Pittle was an Assistant Professor in the College of Engineering at Carnegie-Mellon University. In 1973, Pittle was appointed as one of the five original	13. Pittle Dec., ¶¶ 2-11; Exh 1.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Commissioners of the United States Produce Safety Commission. Pittle served on the Commission until 1982, when he joined CU. Pittle is a member of a number of engineering and consumer organizations. Pittle has authored a number of publications and made numerous presentations and lectures regarding the testing of consumer products and consumer product safety.	
14. Robert Knoll was the head of the Automotive Testing Division of CU from 1965 until his retirement in 1997. Knoll holds a Masters Degree in Automotive Engineering and worked for Chrysler engineering for 11 years until 1965, when he joined CU. In 1973, Knoll was appointed to the National Motor Vehicle Safety Advisory by the U.S. Secretary of Transportation, and served for two terms until 1978. In 1990,	14. Knoll Dec., ¶¶ 2-6.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Knoll was appointed by the U.S. Secretary of Transportation to the Motor Vehicle Safety Research Advisory Committee, where he served until 1995. Knoll's entire professional career has been devoted to testing and evaluating automotive products.	
15. Kevin Sheehan holds a Bachelor of Science degree in Mechanical Engineering. He has worked as a engineer for CU for 33 years. During his time at CU, Sheehan has test driven over 1200 cars and other vehicles.	15. Sheehan Dec., ¶¶ 2-6.
16. Richard Small holds a Bachelor of Science degree in Engineering. Small has worked for CU for 26 years, and has held the positions of Technician, Assistant Engineer, Project Engineer and Senior Project Engineer.	16. Small Dec., ¶¶ 2-3.

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Uncontroverted Fact	Supporting Evidence
17. Frederick E. Wood holds a Bachelor of Mechanical Engineering degree from Yale College. Wood worked for CU from 1952 until 1991, and held the position of test engineer from 1959 to 1991.	17. Wood Dec., ¶¶ 2-3.
18. Irwin Landau is the retired Editorial Director of Consumer Reports. Since his retirement from CU in 1994, Landau has acted as an editorial consultant for Consumer Reports. Landau holds a Masters Degree in Journalism from Columbia University. Landau joined CU in 1966, and held the positions of Assistant Managing Editor, Managing Editor, and Editor and Editorial Director. During Landau's tenure at CU, Consumer Reports won a number of national magazine awards. In 1992, Landau received an Award for Distinguished Achievement from the Columbia Graduate School of Journalism.	18. Landau Dec., ¶¶ 2-9.

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Uncontroverted Fact	Supporting Evidence
19. Winifred Conkling holds a Bachelors degree in Journalism from the Medill School of Journalism at Northwestern University. Conkling worked in the Editorial Department at CU from 1984 until 1990.	19. Conkling Dec., ¶ 3.
PRIMARY WORK OF CU	
20. The primary work of CU is comparative testing of consumer products, comparative evaluation of consumer services, and research and analysis of issues affecting consumers.	20. Karpatkin Dec., ¶ 11.
21. Each year, CU puts thousands of products through lengthy and stringent comparative testing.	21. Karpatkin Dec., ¶ 11.
22. The results of CU's testing and research are published in Consumer Reports magazine.	22. Karpatkin Dec., ¶ 11.

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Uncontroverted Fact	Supporting Evidence
23. The results of CU's testing and research are published on CU's radio program.	23. Karpatkin Dec., ¶ 11.
24. The results of CU's testing and research are published in CU's newspaper column.	24. Karpatkin Dec., ¶ 11.
25. The results of CU's testing and research are published on CU's CD-ROMs.	25. Karpatkin Dec., ¶ 11.
26. The results of CU's testing and research are published in outside media.	26. Karpatkin Dec., ¶11.
27. The goal of publishing the results of CU's testing and research is, among other things, to inform and protect the public.	27. Karpatkin Dec., ¶ 11.
THE AUTO TEST PROGRAM	
28. Vehicles are among the thousands of products tested each year by CU.	28. Karpatkin Dec., ¶ 11; Knoll Dec., 5.

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Uncontroverted Fact	Supporting Evidence
29. The vehicle testing is performed by the Automobile Testing Division ("Auto Test Division") of CU.	29. Knoll Dec., ¶ 3;
30. The Auto Test Division tests approximately 40 cars and other vehicles each year.	30. Knoll Dec., ¶ 5; Karpatkin Dec., ¶ 11.
31. Sport utility vehicles are among the vehicles tested each year by the Auto Test Division.	31. Knoll Dec., ¶ 5.
GOALS OF THE AUTO TEST PROGRAM	
32. One goal of the Auto Test Division is to give expert buying and safety advice to the readers of Consumer Reports.	32. Knoll Dec., ¶ 7.
33. In order to provide its best advice to consumers, CU tests and evaluates all aspects of car ownership and car performance.	33. Knoll Dec., ¶ 7.

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Uncontroverted Fact	**Supporting Evidence**
34. The tests used by the Auto Test Division are designed to compare vehicles with one another.	34. Knoll Dec., ¶ 7.
35. The tests used by the Auto Test Division are designed with an absolute scale of acceptable performance.	35. Knoll Dec., ¶ 7.
36. The testing program at the Auto Test Division adapts test methods and techniques used by manufacturers to suit its goals.	36. Knoll Dec., ¶ 8.
37. The Auto Test Division develops its own tests when they believe they will be more relevant to the experience of consumers.	37. Knoll Dec., ¶ 8.
38. In order to achieve a high level of reliability in its auto testing, CU requires all of its test drivers to be fully qualified and trained engineers.	38. Knoll Dec., ¶ 9.

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Uncontroverted Fact	Supporting Evidence
39. After a vehicle arrives at the Auto Test Division, CU drivers routinely drive the vehicle a minimum of 2,000 miles to break it in.	39. Knoll Dec., ¶ 10.
40. After the vehicle has been broken in, the formal testing process begins.	40. Knoll Dec., ¶ 10.
41. A portion of the testing is the "one day trip," a 150 mile drive through the Connecticut countryside.	41. Knoll Dec., ¶ 11.
42. At the test track, CU engineers perform acceleration, breaking and handling tests.	42. Knoll Dec., ¶ 12.
CU'S HANDLING TESTS	
43. The handling tests conducted by CU test normal vehicle handling and emergency vehicle handling.	43. Knoll Dec., ¶ 13.

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EMERGENCY HANDLING TESTS

Uncontroverted Fact	Supporting Evidence
44. CU's emergency handling evaluation consists of a series of tests performed at its test facility. The tests are: closed circuit cornering evaluations on a one-mile course with both high and low speed corners; a maximum lateral acceleration test performed on a skid pad; and an avoidance maneuver performed on the track straightaway with cone spacing to allow speeds in the 45 to 55 mph range.	44. Knoll Dec., ¶ 14.
45. CU subjects all sport utility vehicles and certain pick up trucks and certain minivans to a modified avoidance maneuver in the speed range of 30 to 45 mph.	45. Knoll Dec., ¶ 14.

THE AVOIDANCE MANEUVER

46. In 1973, CU added the avoidance maneuver test to its testing program.	46. Knoll Dec., ¶ 19.

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Uncontroverted Fact	Supporting Evidence
47. The avoidance maneuver is a double lane change maneuver that replicates an emergency situation where a driver suddenly steers a vehicle out of its traffic lane in the opposing lane to avoid an obstacle and then steers quickly back into the original lane to avoid oncoming traffic.	47. Knoll Dec., ¶ 31.
48. The avoidance maneuver was added to the CU testing program at the suggestion of Carl Thelin, an engineer hired by CU in 1972.	48. Knoll Dec., ¶ 19; Exh. 171 (Thelin Deposition, 44:5-20).
49. Thelin was experienced in vehicle handling and safety through his work at General Motors and Calspan Corporation.	49. Knoll Dec., ¶ 19; Exh. 171 (Thelin Deposition 8:1-21; 24:25-26:4).
50. Thelin participated in a series of tests by GM to evaluate the applicability and reproducibility of task performance tests to determine vehicle handling.	50. Knoll Dec., ¶ 19; Exh 36 (CU013689-CU013718 General Motors Report #A-2561, Development of Task Performance Handling Tests, March 10, 1969).

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Uncontroverted Fact	Supporting Evidence
52. CU has used the avoidance maneuver, known as the "long course," from 1973 to the present.	52. Knoll Dec., ¶ 30.
NEGATIVE MEDIA REPORTS REGARDING THE SAMURAI, 1986-1987	
53. On November 21, 1986, *The Washington Post* reported that its reporter nearly experienced a rollover while testing the Samurai.	53. Exh. 18; Exh. 155.
54. On December 26, 1986, the *Philadelphia Daily News* reported on the Samurai: "Make a sudden, abrupt maneuver at speed and you're courting Highway Hari-Kari. A disclaimer sticker on the driver's door warns you too, in case you didn't know."	54. Exh. 18; Exh. 157.
55. On February 1, 1987, *The New York Times* reported in reviewing the Samurai that the "one thing you notice more than any other is a feeling of instability at speed an in the curves" and stated the vehicle was "fairly tipsy."	55. Exh. 18; Exh. 156.

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Uncontroverted Fact	Supporting Evidence
56. On August 27, 1987, the *St. Petersburg Times* reported on Samurai insurance problems and cited a rollover problem with the Samurai.	56. Exh. 121; Exh. 163.

CU'S 1988 TEST PROGRAM

57. Robert Knoll proposed the full schedule for the 1988 automobile test program in a memorandum dated July 21, 1987. The planned program included a group of sport utility vehicles including the Isuzu Trooper II, the Jeep Cherokee, the Nissan Pathfinder, the Mitsubishi Montero, and the Suzuki Samurai.	57. Knoll Dec., ¶ 46; Exh. 42 (CU006419-CU006420).
58. On August 4, 1987, Knoll circulated a 1988 car test program planning memo that included the Suzuki Samurai.	58. Knoll Dec., ¶ 46; Exh. 43 (CU006421-CU006423).

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Uncontroverted Fact	Supporting Evidence
59. The memo was subsequently revised, such that the Jeep Wrangler was added as a vehicle to be tested, and the Nissan Pathfinder and Mitsubishi Montero were eliminated from the program. The final group of vehicles to be tested were the Jeep Cherokee, the Isuzu Trooper II, the Jeep Wrangler and the Suzuki Samurai.	59. Knoll Dec., ¶ 46; Exh. 44 (CU006424-CU006426); Exh. 45 (CU006436- CU006437); Exh. 46.
PRELIMINARY SAMURAI TESTING	
60. On November 23, 1987, CU purchased a new 1988 Suzuki Samurai hardtop for testing. The vehicle was checked and the engine, front end and tires were set to the manufacturer's specifications. The Samurai did not have power steering.	60. Knoll Dec., ¶ 48; Exh. 47 (CU006438-CU006455); Exh. 48 (CU006457- CU006463).
61. As a part of CU's evaluation and break in process of its test vehicles, CU Auto Test Division staff members drive the vehicles for a period of several months.	61. Knoll Dec., ¶ 49.

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Uncontroverted Fact	Supporting Evidence
62. During the evaluation and break in process, the CU staff members keep detailed logs of their driving of the test vehicles.	62. Knoll Dec., ¶ 49; Exh. 49 (CU006467-CU006492).

SUZUKI SAMURAI ROLLOVER DURING ROUTINE DRIVING BY CU FACILITIES MANAGER

63. On February 8, 1988, Alan Hanks, the Facilities Manager of the Auto Test Division, was engaged in routine driving of the Samurai.	63. Exh 49 (CU006467-CU006492); Exh. 170 (Hanks Deposition, 124:10-12; 137:17-138:12).
64. Hanks reported that while he was driving in 4WD high range along a snow covered gravel road at 15 mph, the Samurai rolled over onto its side.	64. Exh 49 (CU006467- CU006492); Exh. 170 (Hanks Deposition, 137:17-138:12).
65. As a result of rolling over on its side, the outside mirror was broken, the driver's window glass was broken, and the left side of the vehicle was dented, fuel leaked from the carburetor,	65. Exh. 49 (CU006467-CU006492); Exh. 50 (CU006494- CU006501); Exh. 170 (Hanks Deposition, 137:17-138:12).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) brake fluid leaked from the master cylinder, and acid leaked from the battery, and the steering wheel was off by 90 degrees.	
66. Hanks took photographs of the accident.	66. Exh. 50, (CU006494-CU006501); Exh. 170 (Hanks Deposition, 147:20 -149:2; 153:2-154:11).
67. Hanks received assistance returning the vehicle to its wheels and drove it to the Auto Test Division.	67. Knoll Dec., ¶ 50; Exh. 170 (Hanks Deposition, 125:22-126:7).
68. Hanks reported the accident to Robert Knoll, head of the Auto Test Division. Hanks was a long time employee of CU and Knoll had no reason to doubt Hanks' report of the incident.	68. Knoll Dec., ¶ 51; Exh. 51 (CU006464); Exh. 170 (Hanks Deposition 142:21-143:3; 147:20-25).

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Uncontroverted Fact	Supporting Evidence
69. Hanks recorded the details of the accident in contemporaneous log book entries.	69. Knoll Dec., ¶ 51; Exh. 49, (CU006467-CY006492); Exh. 170 (Hanks Deposition, 15:11-14; 17:15-18).
70. After the accident, the Samurai was then repaired to its original specifications at a local repair shop.	70. Knoll Dec., ¶ 50; Exh. 49 (CU006467-CU006492); Exh. 51(CU006464); Exh. 170 (Hanks Deposition, 92:25-93:25).
71. The Samurai was returned to the Auto Tests Division and carefully checked.	71. Knoll Dec., ¶ 51; Exh. 49 (CU006486-CU006487; Exh. 51 (CU006464).
KNOWLEDGE OF THE CENTER FOR AUTO SAFETY DEFECT PETITION	
72. On February 23, 1988, the Center for Auto Safety filed a petition for defect investigation with the National Highway Traffic Safety Administration that alleged that the Suzuki Samurai had a rollover defect and requesting a recall of 1986-1988 Samurais.	72. Exhibit 52 (CU006913-CU006919).

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Uncontroverted Fact	Supporting Evidence
73. Robert Knoll, the head of CU's Automotive Testing Division, received a copy of the CFAS petition on February 29, 1988.	73. Knoll Dec., ¶ 53; Exh. 52 (CU006913-CU006919).

AWARENESS OF THE NBC REPORT ABOUT THE DANGERS OF THE SAMURAI

74. On February 29, March 1 and 2, 1988, NBC Television broadcasted a three part series of news stories regarding the safety of the Samurai and its propensity for rollovers ("the NBC Report").	74. Knoll Dec., ¶ 54; Baird Dec., Exh 53 (CU22896).
75. The NBC Report included video clips of testing of the Samurai by Billy Peterson of the Automotive Safety Testing Facility.	75. Knoll Dec., ¶ 54; Baird Dec., Exh 53 (CU22896).
76. The testing shown in the NBC Report vividly depicted the Samurai tipping up during test maneuvers.	76. Knoll Dec., ¶ 54; Baird Dec., Exh 53 (CU22896).

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Uncontroverted Fact	Supporting Evidence
77. The NBC Report showed that outriggers were used during Mr. Peterson's testing of the Samurai to prevent the vehicle from rolling over.	77. Knoll Dec., ¶ 55; Baird Dec., Exh 53 (CU22896).
78. Outriggers are devices placed on the side of a vehicle to prevent it from rolling over in the event of a tip up.	78. Knoll Dec., ¶ 55; Pittle Dec., ¶ 19.
79. In the NBC Report Mr. Peterson states that the addition of outriggers lowers the center of gravity of the vehicle and should improve handling.	79. Knoll Dec., ¶ 55; Baird Dec., Exh 53 (CU22896).
80. The NBC Report included an interview with Brian O'Neill, President of the Insurance Institute for Highway Safety, a non-profit organization.	80. Knoll Dec. ¶ 55; Baird Dec., Exh 53 (CU22896).
81. The NBC Report included an interview with Ben Kelley.	81. Knoll Dec. ¶ 55; Baird Dec., Exh 53 (CU22896).

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Uncontroverted Fact	Supporting Evidence
82. Robert Knoll saw the NBC Report when it was aired.	82. Knoll Dec., ¶ 55.
83. Knoll sent a videotaped copy of the NBC Report to R. David Pittle, CU's Technical Director.	83. Knoll Dec., ¶ 55.
84. Pittle saw the NBC Report.	84. Pittle Dec., ¶ 19.
85. To the best of CU's knowledge, Suzuki never sued NBC over the NBC Report on the Samurai.	85. Pittle Dec., ¶ 42.
PRECAUTIONS TAKEN IN LIGHT OF INFORMATION KNOWN BY CU	
86. After viewing the NBC Report, both Knoll and Pittle were concerned about the safety of CU drivers while testing the Samurai.	86. Pittle Dec., ¶19; Knoll Dec., ¶ 56.
87. Pittle told Knoll to obtain safety outriggers for the Samurai before testing it.	87. Pittle Dec., ¶19; Knoll Dec., ¶ 56.

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Uncontroverted Fact	Supporting Evidence
88. Pittle told Knoll to obtain the outriggers for the Samurai testing because of his concern to keep CU's drivers safe.	88. Pittle Dec., ¶ 19.
89. Knoll called Billy Peterson and arranged to use the outriggers Peterson had used in the tests for the NBC Report.	89. Knoll Dec., ¶ 56.
90. Knoll believed and continues to believe that attaching outriggers to the vehicle would lower the center of gravity and make it more difficult for a rollover to occur.	90. Knoll Dec., ¶ 57.
APRIL 20, 1988 AVOIDANCE MANEUVER TESTING OF FOUR SUVS	
91. On April 20, 1988, CU began performing the Avoidance Maneuver tests on the SUVs scheduled for the July 1988 issue. The vehicles tested were the 1988 models of the Jeep Cherokee, the Isuzu Trooper II, the Jeep Wrangler, and the Suzuki Samurai.	91. Knoll Dec., ¶ 65.

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Uncontroverted Fact	Supporting Evidence
92. The test crew included Fred Wood, the data taker and test director, Kevin Sheehan and Richard Small, the test drivers, Ron Denison, the camera operator, and Robert Knoll, David Pittle and Irwin Landau as observers. No still photographer was present.	92. Knoll Dec., ¶ 65; Wood Dec. ¶ 12; Small Dec., ¶ 4; Sheehan Dec., ¶ 17; Pittle Dec., ¶ 17; Landau Dec., ¶ 10.
93. Sheehan and Small had viewed the NBC Report prior to the testing.	93. Sheehan Dec., ¶ 16; Small Dec., ¶ 4.
94. As of April 20, 1988, CU tested vehicles on one avoidance maneuver, the "long course."	94. Knoll Dec., ¶ 66.
95. Before the first test runs, CU installed the NBC outriggers on the Samurai.	95. Knoll Dec., ¶ 67.
97. Sheehan was the first driver who drove the Samurai through the long course.	97. Sheehan Dec., ¶ 17; Small Dec., ¶ 5; Knoll Dec., ¶ 67.

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Uncontroverted Fact	**Supporting Evidence**
98. Sheehan drove through the long course with the outriggers installed on the Samurai.	98. Sheehan Dec., ¶ 17; Knoll Dec., ¶ 67; Pittle Dec., ¶ 20; Small Dec., ¶ 5.
99. Sheehan did not experience any tip ups during his sequence of runs through the long course. Sheehan reached up to 53 mph during his runs.	99. Sheehan Dec., ¶¶ 17, 18; Pittle Dec., ¶ 20; Knoll Dec., ¶ 67; Small Dec., 5; Wood Dec., ¶ 13.
100. At no time did Sheehan feel as though the Samurai would tip over, a fact he noted in the test log.	100. Sheehan Dec., ¶ 17, Exh. 66 (CU006711).
101. After seeing that Sheehan experienced no tip ups while driving the Samurai, fears about a tip up were allayed. Small and Knoll agreed that Small would drive through the long course without the use of outriggers.	101. Small Dec., ¶ 6; Knoll Dec., ¶ 68; Sheehan Dec., ¶ 18; Pittle Dec., ¶ 20; Wood Dec., ¶ 15.

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Uncontroverted Fact	Supporting Evidence
102. Knoll approved the removal of the outriggers, and Small drove the long course without outriggers attached to the Samurai.	102. Knoll Dec., ¶ 68; Small Dec., ¶ 6; Sheehan Dec., ¶ 18; Wood Dec., ¶ 15; Pittle Dec., ¶ 20.
103. Small completed his sequence of runs without any two wheel tip ups. His fastest speed was 55 mph.	103. Small Dec., 7; Knoll Dec., ¶ 68; Sheehan Dec., ¶ 18; Pittle Dec., ¶ 20; Wood Dec., ¶ 13.
104. Small noted in his contemporaneous log book that the steering was slow, but that the Samurai responded well and recovered quickly.	104. Small Dec., ¶ 7, Exh. 67 (CU006712).
105. After Small completed his sequence of test runs, Pittle asked Knoll if he could drive the Wrangler and the Samurai through the long course.	105. Pittle Dec., ¶ 21; Knoll Dec., ¶ 69.
107. Pittle is an ordinary driver and not a trained professional. He would not consider testing a vehicle he thought might rollover.	107. Pittle Dec., ¶ 23.

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Uncontroverted Fact	**Supporting Evidence**
108. On the tenth run in Pittle's sequence of runs through the long course at 46.5 mph, the Samurai lifted its two right wheels off the road and tipped up.	108. Pittle Dec., ¶ 24; Knoll Dec., ¶ 70; Sheehan Dec., ¶ 19; Small Dec.¶ 8; Wood Dec., ¶ 16; Exh. 68.
110. The tip up was a startling and unexpected occurrence.	110. Pittle Dec., ¶ 24; Knoll Dec., ¶ 70; Sheehan Dec., ¶ 19; Small Dec., ¶ 8; Wood Dec., ¶ 14.
111. Pittle states that he did not purposefully cause the Samurai to tip up. There is *no evidence* to the contrary.	111. Pittle Dec., ¶ 23; Exhs. 168, 169 (Denison Deposition. pp. 147, 148, 232).
112. Persons cheered when Pittle came down safely without injury. They *also cheered earlier* when Pittle made it through the course without knocking over any cones.	112. Knoll Dec., ¶ 70; Sheehan Dec., ¶ 20; Small Dec., ¶ 9; Wood Dec., ¶ 15; Exh. 68.
113. Pittle stopped driving the Samurai and did not drive the Wrangler.	113. Pittle Dec., ¶ 24.

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Uncontroverted Fact	**Supporting Evidence**
114. Had Knoll believed the Samurai would tip up, he would not have allowed Small or Pittle to drive the Samurai without outriggers.	114. Knoll Dec., ¶ 70.
115. All of the other vehicles tested by CU that day completed the long course without incident.	115. Knoll Dec., ¶ 71.
DEVELOPMENT OF THE SHORT COURSE	
116. Knoll determined that Pittle's tip up resulted when Pittle started the first turn a split second late, thereby effectively extending the entry lane, necessitating a sharper right turn around the obstacle cone.	116. Knoll Dec., ¶ 73; Pittle Dec., ¶ 25.
117. Pittle asked Knoll to design a test program.	117. Pittle Dec., ¶ 26.
118. Knoll and other CU engineers reasoned that if they modified the course by shortening the entry distance to the obstacle cone and moving the cone (so as to replicate the path	118. Knoll Dec., ¶ 73; Pittle Dec., ¶ 26; Sheehan Dec., ¶ 21; Small Dec., ¶ 10; Wood Dec., ¶ 16.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) driven by Pittle) they could determine if the results were an aberration or if the Samurai and all or some of the other SUVs tested would experience rollovers.	
119. The modification was made to the course to determine how *all of the sport utility vehicles, not just the Samurai*, would react to this maneuver.	119. Knoll Dec., ¶ 73; Pittle Dec., ¶ 26; Sheehan Dec., ¶ 21; Small Dec., ¶ 10; Wood Dec., ¶ 16.
120. The modified course became known as the "short course."	120. Knoll Dec., ¶ 73; Pittle Dec., ¶ 26; Sheehan Dec., ¶ 21; Small Dec., ¶ 10; Wood Dec., ¶ 16.
121. There is *no evidence* that anyone instructed Pittle, Small or Wood to *deliberately tip up* the Samurai on the day of the April 20, 1988 testing.	121. Landau Dec., ¶ 56; Knoll Dec., ¶ 111; Pittle Dec., ¶ 27; Sheehan Dec., ¶ 23; Small Dec., ¶ 18; Wood Dec., ¶ 36.

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UNCONTROVERTED TESTIMONY OF RON DENISON

Uncontroverted Fact	Supporting Evidence
123. Ron Denison, a former CU employee who was present at the April 20, 1999 testing, testified that he knew and respected Pittle and considered him a brilliant man, a man of integrity and professionalism. Denison does not believe Pittle would deliberately tip up the Samurai.	123. Exhs. 168, 169 (Denison Deposition, 143:16-144:5; 148:2-6; 232:10-12).
124. Denison testified that he had an especially high regard for Knoll, and believed him to be a man of integrity, honesty, professionalism, and who would never rig a test. Denison does not believe Knoll rigged the Samurai testing nor participate in knowingly put out false test results.	124. Exhs. 168, 169 (Denison Deposition, 144:6-12; 146:19-147:25; 232:8-9).
125. Denison testified that Sheehan is a very honest person, a professional, and a man of integrity.	125. Exhs. 168, 169 (Denison Deposition, 143:9-15; 232:7).

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Uncontroverted Fact	Supporting Evidence
126. Denison testified that Wood is a man of integrity and an honest man. Denison does not believe Wood intentionally tipped up the Samurai.	126. Exhs. 168, 169 (Denison Deposition, 232:24-25; 313:24-314:12).
127. Denison testified that Small is a man of integrity. Denison does not believe that Small was intentionally trying to tip up the Samurai.	127. Exhs. 168, 169 (Denison Deposition, 232:13-14; 314:13-17).
128. When asked whether he thought CU did something dishonest, Denison testified he didn't think CU was dishonest.	128. Exhs. 168, 169 (Denison Deposition 221:14-222:9).
APRIL 26, 1988 TESTING	
129. The next day of testing the vehicles was April 26, 1988. Present at the testing on that day were Joe Nappi, data taker, Fred Wood and Rick Small, test drivers, Ron Denison, camera operator, and Kevin Sheehan, Alan Hanks, and Robert Knoll as observers.	129. Knoll Dec., ¶ 74; Nappi Dec., ¶ 3; Sheehan Dec., ¶ 22; Small Dec., ¶ 11; Wood Dec., ¶ 17.

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Uncontroverted Fact	**Supporting Evidence**
130. Sheehan asked Knoll to excuse him from driving the Samurai through the short course because he was afraid to drive the vehicle. Sheehan was replaced by Wood. Since then, from 1989 to 1999, Sheehan has driven many vehicles through the short course.	130. Sheehan Dec., ¶ 22; Wood Dec., ¶ 17.
131. Wood was the first test engineer to drive the Samurai through the short course with outriggers attached on April 26, 1988. Wood's fastest successful speed was 42.4 mph.	131. Wood Dec., ¶ 18; Knoll Dec., ¶ 75.
132. On a Wood run at 42.2 mph, both of the right side tires of the Samurai lifted off the pavement, but the Samurai did not tip up all the way on to the outriggers.	132. Wood Dec., ¶ 18; Knoll Dec., ¶75; Small Dec., ¶ 12; Nappi Dec., ¶ 4.

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Uncontroverted Fact	**Supporting Evidence**
133. On a Wood run through the course, at 41.3 mph, the Samurai suddenly tipped up onto the outriggers.	133. Wood Dec., ¶ 18; Knoll Dec., ¶ 75; Small Dec., ¶ 12; Nappi Dec., ¶ 4.
134. Small was the second test engineer to drive the Samurai through the short course. Small also drove with outriggers attached to the Samurai.	134. Small Dec., ¶ 13; Knoll Dec., ¶76; Wood Dec., ¶ 21; Nappi Dec., ¶ 5.
135. On a Small run through the short course, Small experienced a sudden and full tip up onto the outriggers at 40.2 mph.	135. Small Dec., ¶ 13; Knoll Dec., 76; Wood Dec., ¶21; Nappi Dec., ¶ 5.
136. After Small's tip up in the Samurai, Knoll concluded that it was not necessary to make any more test runs of the Samurai because the 1988 Samurai had demonstrated a dangerous rollover propensity, and Knoll did not want to put anyone needlessly at risk.	136. Knoll Dec., ¶ 76; Small Dec., ¶ 13.

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Uncontroverted Fact	Supporting Evidence
137. CU next ran the Jeep Wrangler with outriggers attached through the short course and no tip ups occurred.	137. Knoll Dec., ¶ 78; Wood Dec., ¶ 23.
138. CU next ran the Isuzu Trooper II through the short course without any tip up.	138. Knoll Dec., ¶ 78.
139. At no time during tests of the Jeep Wrangler, the Jeep Cherokee or the Isuzu Trooper II was there any tip up.	139. Knoll Dec., ¶ 78; Exh. 71 (CU006748-CU006757).
MAY 12, 1988 TESTING	
140. In late January or early February of 1988, A. Liska at Rogers & Associates, Suzuki's public relations firm, wrote to Knoll regarding CU's purchase of the 1988 Samurai for evaluation.	140. Knoll Dec., ¶ 80.

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Uncontroverted Fact	**Supporting Evidence**
141. Liska's letter to Knoll stated that the 1988½ model year Samurai had suspension modifications that Suzuki claimed would improve its ride.	141. Knoll Dec., ¶ 80.
142. CU believed the suspension modifications on the 1988 ½ Samurai could affect handling and therefore on May 6, 1988, CU purchased a new 1988½ Samurai for evaluation of its handling.	142. Knoll Dec., ¶ 80
143. Testing of the sport utility vehicles continued on May 12, 1988. The vehicles tested were the 1988½ Samurai and the Jeep Cherokee. Comparative testing was performed with the Jeep Wrangler and Ford Festiva.	143. Knoll Dec. ¶¶ 81 84; Pittle Dec., ¶¶ 31, 33.

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Uncontroverted Fact	**Supporting Evidence**
144. Present at the May 12, 1988 testing were Nappi, data taker, Wood and Small, test drivers, a camera operator, and Sheehan, Knoll, Pittle, Joyce Newman, David Berliner, and Alan Hanks, as observers.	144. Knoll Dec., ¶ 81 Pittle Dec., ¶ 31; Small Dec., ¶ 14; Wood Dec., ¶ 24.
145. CU employees believed they had made important findings with respect to the Samurai. CU obtained a professional videographer to record the results of the testing.	145. Pittle Dec., ¶ 32; Knoll Dec., ¶ 81.
146. The head of CU's Office of Public Information and the head of Consumer Reports Television were present at the May 12, 1988 testing as observers due to what CU believed to be important findings regarding the Samurai.	146. Pittle Dec., ¶ 32; Knoll Dec., ¶ 81.

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Uncontroverted Fact	**Supporting Evidence**
147. CU planned to hold a press conference when their findings on the Samurai were fully developed and completed.	147. Pittle Dec., ¶ 32.
148. Small drove the 1988½ Samurai for five runs through the short course with outriggers installed.	148. Small Dec., ¶ 15.
149. On a Small run through the short course, the 1988½ Samurai lifted both right side wheels.	149. Small Dec., ¶ 15; Knoll Dec., ¶ 82; Wood Dec., ¶ 25.
150. On a Small run through the short course, the 1988½ Samurai, there was a sudden and significant tip up onto the outriggers at 38.7 mph.	150. Small Dec., ¶ 15; Knoll Dec., ¶ 83; Wood Dec., ¶ 25; Exh. 72 (CU006798).
151. Wood then drove the 1988½ Samurai. On Wood's second run through the short course, the 1988½ Samurai tipped up onto the outriggers at 37.4 mph.	151. Wood Dec., ¶ 26; Knoll Dec., ¶ 83; Small Dec., ¶ 16; Exh. 73 (CU006797).

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Uncontroverted Fact	**Supporting Evidence**
152. While watching the 1988½ Samurai being driven through the short course on an early run at a low speed, Pittle said, "Can't you just see it, we get no lift off the ground."	152. Pittle Dec., ¶ 34.
153. Small drove the Jeep Wrangler through the short course without outriggers.	153. Wood Dec., ¶ 27; Knoll Dec., ¶ 84.
154. Small achieved clean runs through the short course in the Jeep Wrangler at 40.5 mph.	154. Knoll Dec., ¶ 84.
155. Wood drove the Jeep Cherokee through the short course at 39.75 mph.	155. Knoll Dec., ¶ 84; Wood Dec., ¶ 28.
156. Wood drove the Ford Festiva through the short course for comparative purposes and achieved a clean run at 40.5 mph.	156. Wood Dec., ¶ 28; Knoll Dec., 84.

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Uncontroverted Fact	**Supporting Evidence**
157. In late May 1988, Wood and Small prepared memos describing the steering and handling of the Samurai during the avoidance maneuver tests and sent them to Knoll.	157. Knoll Dec., ¶ 85; Wood Dec., ¶ 29; Small Dec., ¶ 17; Exh. 74 (CU006800); Exh. 75 (CU006815- CU006816).
158. Wood testifies that during the May 12, 1988 testing, he did not deliberately try to roll or tip up the 1988½ Samurai. There is not evidence to the contrary.	158. Wood Dec., ¶¶ 37-39; Small Dec., ¶¶ 19, 20, 23.
159. Small testifies that during the May 12, 1988 testing, he did not deliberately try to roll or tip up the 1988½ Samurai. There is no evidence to the contrary.	159. Small Dec., ¶¶ 20-23; Wood Dec., ¶¶35-39.
160. All of the persons involved with the CU testing and publication of the article believe that the Samurai was tested	160. Small Dec., ¶ 22; Wood Dec., ¶ 39-41.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) fairly and honestly, and subjected to the same test conditions as the other sport utility vehicles.	
BACKGROUND RESEARCH FOR ARTICLE	
161. In connection with research for the article regarding the Samurai, CU employee Winifred Conkling interviewed Sam Cole of the Center for Auto Safety in early March of 1988.	161. Conkling Dec., ¶¶ 6,7; Exh. 87 (CU009692-CU009693).
162. The Center for Auto Safety is a non profit auto safety organization whose reports and findings are widely quoted by many of the country's largest and best known media organizations.	162. Conkling Dec., ¶ 10.
163. Cole gave Conkling statistics regarding rollover accidents.	163. Conkling Dec., ¶ 8.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) Conkling cross checked this information with database information from the NHTSA.	
164. Conkling also interviewed Brian O'Neill, the president of the Insurance Institute of Highway Safety on March 3, 1988. O'Neill and Ian Jones provided Conkling with information regarding the center of gravity and mathematical formula for the stability ratio of vehicles.	164. Conkling Dec., ¶ 9; Exh. 85 (CU009707-CU009708).
165. The Insurance Institute for Highway Safety is a not for profit safety organization whose reports and findings are widely quoted by many of the country's largest and best known media organizations.	165. Conkling Dec., ¶ 10.
166. Conkling interviewed Tim Hurd of NHTSA in connection with the Samurai article.	166. Conkling Dec., ¶ 11; Exh. 86 (CU009692-CU009693).

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Uncontroverted Fact	**Supporting Evidence**
167. Conkling interviewed Steve Handelsman of NBC in connection with the Samurai story some time between March 3, 1988 and April 26, 1988.	167. Conkling Dec., ¶ 12; Exh. 87 (CU009713).
168. During Conkling's interview of Handelsman, Handelsman told Conkling that "we have found the Suzuki can roll over in ordinary emergency maneuvers on dry pavement."	168. Conkling Dec., ¶ 12.
169. Conkling forwarded on April 27, 1988 memo to Landau that Conkling prepared for Landau and outlined various materials she was sending to him. Conkling also sent her interview notes to Landau.	169. Conkling Dec., ¶¶ 7, 14; Exh. 84 (CU009690).
170. Conkling forwarded a memo to Landau dated May 2, 1988, regarding interviews she conducted with ten large auto insurance companies regarding insurability problems for the Samurai.	170. Conkling Dec., ¶ 15; Exh. 119 (CU008509-CU008510).

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Uncontroverted Fact	Supporting Evidence
171. Conkling found that some insurance companies had questions concerning Samurai safety.	171. Conkling Dec., ¶ 15; Pittle Dec., ¶ 60; Exh. 119 (CU008509-
DRAFTS AND REVISIONS OF ARTICLE	
172. Between May 2, 1988 and May 26, 1988, the article on the Samurai for the July 1988 Consumer Reports issue went through numerous drafts.	172. Landau Dec., ¶ 14.
173. The drafts of the article were distributed for review and comment to persons within the Editorial and Technical Department, including the Auto Test Division.	173. Landau Dec., ¶ 19; Knoll Dec., ¶91; Exhs. 90, 104; Pittle Dec., ¶¶ 35-39; Wood Dec., ¶ 42; Small Dec., ¶ 25; Sheehan Dec., ¶ 30.
174. The persons in the Editorial Department who reviewed the drafts of the article included Landau, Weber, and Conkling.	174. Landau Dec., ¶ 19.

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Uncontroverted Fact	**Supporting Evidence**
175. The persons in the Technical Department who reviewed the drafts of the article included Pittle, Knoll, Sheehan, Small, and Wood.	175. Landau Dec., ¶ 19; Knoll Dec., ¶91; Exhs. 90, 104; Pittle Dec., ¶¶ 35-39; Wood Dec., ¶ 42; Small Dec., ¶ 25; Sheehan Dec., ¶ 30.
176. Many revisions were made to the various draft versions of the manuscript leading up to the final article.	176. Landau Dec., ¶¶ 19, 23-51; Knoll Dec., ¶ 90, 91; Pittle Dec., ¶¶ 35-40.
177. The purpose of the lengthy reviewing, revising and checking process was to do all CU could to assure that the final published article was truthful, scientifically accurate, and comprehensible to the readers of Consumer Reports.	177. Landau Dec., ¶ 20.
178. CU's normal practice in connection with drafting stories about vehicle testing is for the Auto Test Division staff to write a Technical Report to Editorial.	178. Knoll Dec., ¶ 88; Landau Dec., ¶ 17.

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Uncontroverted Fact	**Supporting Evidence**
179. The Technical Report forms the basis for the article and contains an introduction, a body, a car by car analysis and recommendations and data tables of facts and figures.	179. Knoll Dec., ¶ 88.
180. The Technical Report is then sent to Editorial when it is complete. A writer would then add additional research material, have the manuscript fact checked and turn it into a draft of the final article.	180. Knoll Dec., ¶ 88.
181. The procedure followed in connection with the July 1988 article regarding the Samurai was slightly different. The Auto Test Division wrote the car by car stories and analysis, data tables and their recommendations, but Landau wrote the portion of the article regarding the Samurai.	181. Exh. 76 (CU006714-CU006747); Exh. 77 (CU006758-CU006759); Exh. 78 (CU006760-CU006796).

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Uncontroverted Fact	Supporting Evidence
182. Landau decided to write the Samurai portion of the article himself because rating a vehicle "Not Acceptable" was unusual and Landau wanted CU to bring to bear its highest level of editorial oversight, skill, and experience.	182. Landau Dec., ¶ 14; Knoll Dec., ¶ 89.
183. The Auto Test Division still had some testing to complete, so Knoll sent a draft of the Technical Report, rather than the final version, to Landau. Landau received the Technical Report on May 2, 1988.	183. Knoll Dec., ¶ 90; Landau Dec., ¶¶ 17, 30; Exh. 76 (CU006714-CU006747).
184. Handwritten corrections dated May 5, 1988 by Sheehan, Small, and Wood were made to the draft.	184. Exh. 76 (CU006714-CU006747).
185. The Auto Test Division prepared a revised version of the Technical Report dated May 6, 1988. The May 6, 1988 draft has handwritten corrections made by Auto Test engineers.	185. Exh. 77 (CU006758-CU006795).

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Uncontroverted Fact	Supporting Evidence
186. The May 6, 1988 draft was sent to Landau around that same date.	186. Landau Dec., ¶ 31.
187. After Landau received the draft Technical Report, he wrote the portion of the article on the Samurai. Landau wrote the Samurai portion of the article between May 2 and May 9, 1988, most likely between the 6th and the 9th.	187. Landau Dec., ¶ 18, 32; Exh. 89 (CU010252-CU010264).
188. At the time Landau first wrote the Samurai portion of the article in early May of 1988, Landau believed that the testing of all of the vehicles he described had been completed.	188. Landau Dec., ¶ 18.
189. Landau's belief was based on the fact that at some point between April 26, 1988 and May 12, 1988, Knoll communicated to Landau that all three other vehicles had successfully completed the testing on the short course.	189. Knoll Dec., ¶ 90; Landau Dec., ¶ 18.

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Uncontroverted Fact	**Supporting Evidence**
190. The testing of the Jeep Cherokee on the short course was not completed until May 12, 1988.	190. Knoll Dec., ¶ 90.
191. Because the May 12, 1988 testing was consistent with Landau's earlier draft of the article, no changes were made to any reported results in later drafts of the article.	191. Landau Dec., ¶ 18.
192. In addition to receiving the Technical Report, Landau also had numerous informal conversations with Knoll regarding the progress of testing and test results.	192. Landau Dec., ¶ 17; Knoll Dec., ¶ 90.
193. Landau also obtained information from Conkling, including interview notes and other research as well as materials from CU's Library in preparation for the article.	193. Landau Dec., ¶17; Exhs. 84, 85, 86, 87.
194. Landau shared these materials with Mary Weber who was assisting him in editing and writing the article.	194. Landau Dec., ¶ 17.

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Uncontroverted Fact	**Supporting Evidence**
195. During early May 1988, Landau and Weber edited the Technical Report for style and turned it into the first editorial draft of the Consumer Reports article.	195. Landau Dec., ¶ 17.
196. After Landau wrote his revised second draft of the Samurai portion of the July 1988 article, he sent copies to Knoll and Weber. It was circulated for review on May 9, 1988.	196. Landau Dec., ¶ 33; Exh. 90 (CU010265-CU010278).
197. On May 9, 1988, Pittle edited a draft of the Consumer Reports article rating the Samurai "Not Acceptable."	197. Pittle Dec., ¶ 30; Exh. 2 (CU010238-CU010251).
198. At the time Pittle reviewed the draft on May 9, 1988, Pittle believed that the testing of the other vehicles reported in the draft had been completed.	198. Pittle Dec., ¶ 30.

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Uncontroverted Fact	Supporting Evidence
199. A third draft of the Samurai portion is dated May 9, 1988. By the time of this draft, the Samurai portion had been circulated to Pittle and to legal counsel for legal review.	199. Landau Dec., ¶ 34; Exh. 2 (CU010238-CU010251).
200. Landau circulated the drafts of the Samurai portion to Knoll and the Auto Test Division staff for their review and comment on May 10 or 11, 1988.	200. Knoll Dec., ¶ 90; Landau Dec., ¶ 35; Exh. 79 (CU006801-CU006814).
201. The Auto Test Division staff made revisions and comments on the draft and returned it to Landau.	201. Knoll Dec., ¶ ¶ 89-90; Landau Dec., ¶¶ 19, 35; Exh. 79 (CU006801-CU006814).
202. On May 10, 1988, a draft of the article combining the Samurai portion of the article with the Technical Report was prepared as it was being fashioned into the Consumer Reports article.	202. Landau Dec., ¶ 36; Exh. 91 (CU010279-CU010325).

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Uncontroverted Fact	**Supporting Evidence**
203. Another draft of the Technical Report as it was being fashioned into the Consumer Reports article was prepared after May 10, 1988.	203. Landau Dec., ¶ 37; Exh. 92 (CU010326-CU010379).
204. The first printer's proof of the Samurai portion of the article, dated May 17, 1988, was reviewed and corrected by Pittle on May 18, 1988.	204. Pittle Dec., ¶ 35; Landau Dec., ¶ 38; Exh. 3, (CU009632-CU009637).
205. The first proofreading master copy of the entire article is dated May 18, 1988. It was circulated to the Technical Department and the Library for review.	205. Landau Dec., ¶ 39; Exh 93 (CU010179-CU010203).
206. The Library Check Copy of the Samurai portion of the article is dated May 18, 1988 and shows the checked source of each paragraph of the introductory portion of the article.	206. Landau Dec., ¶ 40; Exh 94 (CU009655-CU009660).

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Uncontroverted Fact	**Supporting Evidence**
207. The Library Check Copies of the remainder of the May 18, 1988 draft show the checked sources for statements made in the article.	207. Landau Dec., ¶ 41; Exhs. 95, 96, 97, 98, 99 (CU009661-CU09680).
208. The page proof of the article, dated May 20, 1988, was reviewed and edited by Pittle.	208. Pittle Dec., ¶ 36; Landau Dec., ¶ 42; Exh. 4 (CU009638-CU009647).
209. The page proof of the article, dated May 20, 1988, was also reviewed and corrected by the Auto Test Division staff.	209. Landau Dec., ¶ 43; Exh. 100 (CU010225-CU010236).
210. Editorial made corrections to the proofreading master copy of the May 20, 1988 page proof of the article.	210. Landau Dec., ¶ 44; Exh. 101 (CU010151-CU010159).
211. On May 24, 1998, Pittle reviewed and edited the revised page proof of the article.	211. Pittle Dec., ¶ 37; Landau Dec., ¶ 45; Exh. 5 (CU009648-CU009651).

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Uncontroverted Fact	**Supporting Evidence**
212. Additional corrections were made to the proofreading master revised page proof dated May 24, 1988.	212. Landau Dec., ¶ 46; Exh 102 (CU01060-CU010165).
213. On May 26, 1988, Pittle reviewed and edited the May 26, 1988 revised proof of the article.	213. Pittle Dec., ¶ 38; Landau Dec., ¶ 47; Exh. 6 (CU009652-CU009653).
214. Additional edits to the May 26, 1988 proofreading master copy of the article were made by the Technical Division.	214. Landau Dec., ¶ 48; Exh. 103 (CU010166-CU010174).
215. The May 26, 1988 page proof was then reviewed by the Editorial Department.	215. Landau Dec., ¶ 49.
216. The change in the term "tread width" to "tread" was checked with Knoll.	216. Landau Dec., ¶ 49.
217. Knoll believes that the drafts of the Technical Report and July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Knoll believes otherwise.	217. Knoll Dec., ¶ 91.

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Uncontroverted Fact	**Supporting Evidence**
218. Sheehan believes that the drafts of the Technical Report and the July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Sheehan believes otherwise.	218. Sheehan Dec., ¶ 30.
219. Small believes that the drafts of the Technical Report and the July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Small believes otherwise.	219.Small Dec., ¶ 25.
220. Wood believes that the drafts of the Technical Report and the July 1988 article are and were a fair and accurate reflection of the results of the testing. There is no evidence that Wood believes otherwise.	220. Wood Dec., ¶¶ 42, 43.
221. Pittle believes the article was and is truthful, fair and accurate. There is no evidence that Pittle believes otherwise.	221. Pittle Dec., ¶ 107.

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Uncontroverted Fact	Supporting Evidence
222. Landau believes the article was and is truthful, fair and accurate. There is no evidence that Landau believes otherwise.	222. Landau Dec., ¶¶ 53, 57.
223. Conkling believes the article was and is truthful, fair and accurate. There is no evidence that Conkling believes otherwise.	223. Conkling, ¶ 18.
CU'S POLICIES AND PROCEDURES FOR THE ARTICLE REVIEW PROCESS	
224. All copy that goes into Consumer Reports magazine is repeatedly checked for accuracy before publication.	224. Landau Dec., ¶ 21.
225. Principal responsibility for checking product review articles rests with the Library and the Technical Department. Copy is reviewed and any needed changes are passed on to the Editorial Department.	225. Landau Dec., ¶ 21.

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Uncontroverted Fact	**Supporting Evidence**
226. The Library checks all articles for grammar, coherence and sense, and checks the accuracy of the facts reported in the articles against sources provided by the writer.	226. Landau Dec., ¶ 21.
227. Product articles are largely based on reports provided to the Editorial Department by the Technical Department.	227. Landau Dec., ¶ 22.
228. The Library is responsible for checking the accuracy of all facts based on editorial research.	228. Landau Dec., ¶ 22.
229. The stages of the copy process are: Manuscript, Galley (sometimes revised), Page Proof (often revised), and Ready for Casting. The printer's copy, which communicates all changes to the printer of the next versions, is produced by the Editorial Department between each of the stages of copy.	229. Landau Dec., ¶ 23.

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Uncontroverted Fact	**Supporting Evidence**
230. One copy of each article is identified as the "Library Check Copy" which is the main Library copy and is part of the permanent record of each published article.	230. Landau Dec., ¶ 23.
231. The Library Check Copy is proofread, copy-checked and sourced. Suggested changes are followed up with Editorial until and sometimes beyond the closing of the article.	231. Landau Dec., ¶ 23.
232. In connection with product articles, the Library reviews Galley and Ready for Casting copy. All statements that do not come from the Technical Report are sourced.	232. Landau Dec., ¶ 24.
233. The writer provides any sources other than the Technical Report to the Library at the Galley stage, along with the sourced galley.	233. Landau Dec., ¶ 24.

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Uncontroverted Fact	Supporting Evidence
234. The Technical Department is responsible for checking technical data.	234. Landau Dec., ¶ 24.
235. Whenever a product is to be judged "Not Acceptable," or if the manuscript severely criticizes a product or implies a safety problem, the draft manuscripts for the article are sent to counsel for legal review.	235. Landau Dec., ¶ 26.
236. All of CU's policies and procedures were followed in connection with the writing and publication of the July 1988 article regarding the Suzuki Samurai.	236. Landau Dec., ¶ 27.
THE FINAL ARTICLE	
237. Rhoda Karpatkin, the president of CU and the person with ultimate responsibility at CU, reviewed the final article before it was published.	237. Karpatkin Dec., ¶¶ 22, 23.

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Uncontroverted Fact	Supporting Evidence
238. CU believed at the time it published the article and still believes that the article was truthful, accurate, and fair.	238. Karpatkin Dec., ¶ 23; Pittle Dec., ¶ 113; Knoll Dec., ¶ 113; Landau Dec., ¶ 53; Conkling Dec., ¶ 18.
239. The final article appeared in the July 1988 issue of Consumer Reports.	239. Landau Dec., ¶ 50; Exh. 105 (CU007353-CU007361).
THE JUNE 2, 1988 PRESS CONFERENCE	
240. CU decided its findings regarding the safety of the Samurai warranted a public announcement at a press conference.	240. Pittle Dec., ¶ 32; Landau Dec., ¶ 59.
241. CU believed it was paramount to get important safety information to the public.	241. Karpatkin Dec., ¶ 27(b); Landau Dec., ¶ 59; Exh. 107 (CU005094-CU005101).
242. It is CU's policy not to disclose its test results to manufacturers or the government before releasing the information to consumers.	242. Pittle Dec., ¶¶ 43-45; Exh. 8 (CU004033-CU004037).

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Uncontroverted Fact	**Supporting Evidence**
243. The day before the June 2, 1988 press conference, Pittle sent a letter for overnight delivery to Douglas Mazza of American Suzuki Motor Corp., Suzuki's American subsidiary, expressing CU's concerns regarding the Samurai and enclosing a prepublication copy of the article.	243. Pittle Dec., ¶ 43; Exh 7 (CU013973).
244. By the time of the June 2, 1988 press conference, the July 1988 Consumer Reports article was completed.	244. Pittle Dec., ¶ 46.
245. Pittle was satisfied that all references to Suzuki and to the Samurai in the article were fully truthful and accurate, a belief he holds to this day.	245. Pittle Dec., ¶ 46.
246. On June 2, 1988, CU sent a letter to NHTSA in support of the Center for Auto Safety Petition and filed a petition for rulemaking with NHTSA to develop a rollover standard.	246. Pittle Dec., ¶ 47; Exh. 126 (CU005412-CU005418); Exh. 175.

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Uncontroverted Fact	**Supporting Evidence**
247. CU held a press conference on June 2, 1988, at which it announced that the Suzuki Samurai had shown a hazardous propensity to roll over in CU's tests, and that the vehicle would be rated "Not Acceptable" in an article to appear four weeks later in the July 1988 issue of Consumer Reports.	247. Pittle Dec., ¶ 48.
248. Dr. Pittle spoke at the June 2, 1988 press conference.	248. Pittle Dec., ¶ 48.
249. Dr. Pittle declares that he sought to be truthful in all of his comments at the press conference and did not act with any malice toward Suzuki or the Samurai. Dr. Pittle states his only goal was to advise the public of what he and CU believed to be a serious danger to consumers. There is no evidence to the contrary.	249. Pittle Dec., ¶ 48.

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Uncontroverted Fact	**Supporting Evidence**
250. At the time he made the statements at the press conference, Pittle believed that all of the statement he made were true.	250. Pittle Dec., ¶ 107.
251. During the press conference, Dr. Pittle referred to CU drivers making 90-180 degree turns as the amount which the drivers turned the steering wheel during the testing. This is what the drivers originally believed and told Dr. Pittle, a view that they subsequently changed and a change that is immaterial to CU's rating of the Samurai.	251. Pittle Dec., ¶ 49.
252. At the June 2, 1988 press conference, when Pittle described the maneuver as "benign."	252. Pittle Dec., ¶ 49.

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INVESTIGATION BY THE ATTORNEYS' GENERAL, JUNE 1988

Uncontroverted Fact	Supporting Evidence
255. In June of 1988, Dr. Pittle learned that the Attorneys General of several states were investigating Suzuki regarding misleading advertising for the Samurai.	255. Pittle Dec., ¶ 56.
256. The Attorneys General contacted CU to obtain video footage of CU's testing of the Samurai. On June 20, 1988, CU provided the videotape that was shown at the press conference.	256. Pittle Dec., ¶ 56; Exh. 16 (CU004129).

CONSUMERS ASSOCIATION OF ENGLAND FINDS THE SAMURAI DANGEROUS, JULY 1988

257. On July 19, 1988, Consumers' Association of England issued a press release calling for a halt to sales in the United Kingdom of the Suzuki SJ 413 (Samurai) and the Suzuki SJ 410.	257. Exh 11 (CU006909-CU006912).

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Uncontroverted Fact	Supporting Evidence
258. Consumers Association is a not for profit British organization devoted to objectively testing and reporting on consumer products for the benefit of the consumer. Consumers Association produces a series of monthly magazines publishing test results on a range of consumer products, including cars.	258. Exh. 173 (Expert Report of Andrew Jarmin, ¶¶ 2, 4, 5).
259. In June 1988, Consumers Association put the Suzuki Samurai through CU's short course and CU's long course and the J-turn. The Samurai tipped up on two wheels during the short course and tipped up at 20 mph during the J-turn.	259. Exh. 173 (Expert Report of Andrew Jarmin, ¶¶ 12, 13, 15).
260. Dr. Pittle read the Consumers' Association press release on July 19, 1988 and sent a copy of it to Knoll the same day.	260. Pittle Dec., ¶ 52; Exh. 11 (CU006909-CU006912).

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Uncontroverted Fact	Supporting Evidence
261. On August 3, 1988, Julian Edwards of Consumers' Association sent Dr. Pittle a faxed message regarding additional testing Consumers' Association had performed on the Samurai regarding the J-turn test. The message warned CU not to perform the J-turn test with the Samurai because the vehicle begins to roll over at 20 mph.	261. Pittle Dec., ¶ 53; Exh. 12 (CU006904).
262. On August 26, 1988, Dr. Pittle received from Edwards a copy of an article to be published in the September 1988 issues of *Which?*, the magazine of Consumers' Association. The article was entitled "Danger" Suzukis Roll Over, Our Tests – and the Experiences of Suzuki Owners – Show that Suzuki SJs Can Roll Over at Speeds as Low as 20 mph."	262. Pittle Dec., ¶ 54; Exh. 13 (CU026634-CU026636).

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Uncontroverted Fact	Supporting Evidence
263. The *Which?* article was devoted to discussing Consumer Association's tests and reports of actual Suzuki Samurai rollover accident victims in Britain.	263. Pittle Dec., ¶ 54; Exh. 13 (CU026634-CU026636).
264. Consumers' Association followed up the September 1988 article in October of 1988 and April of 1990, again reporting on the Samurai's rollover propensity.	264. Pittle Dec., ¶ 55; Exh. 14 (CU006980); Exh. 15 (CU006984-CU006989).
265. Consumers Association disagreed with the British Government's refusal to recall the Samurai.	265. Exh. 174 (Jarmin Deposition, 177:5-180:5); Exh 173 (Expert Report of Andrew Jarmin, Exhs. F, H).
THE LOTUS REPORT	
267. In 1988, Lotus Engineering prepared a report on the Samurai for Suzuki.	267. Exh. 144; Exh. 154.

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Uncontroverted Fact	**Supporting Evidence**
268. In connection with preparing the report on the Samurai, Lotus made the following finding regarding the Consumers Union test: "The CU2 lane change maneuver is a test designed to simulate an accident avoidance condition which could occur on public roads. As with other simulated tests, the benefits are those of consistent environmental conditions and of repeatability within the confines of driver consistency. It is considered that simulated lane change manoeuvres carried out in controlled conditions represent only a small proportion of real world situations, but do allow reasonably accurate comparative assessments to be undertaken."	268. Exh. 144; Exh. 154.

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CU'S RESPONSE TO NHTSA DENIAL OF THE CFAS PETITION, SEPTEMBER 1988

Uncontroverted Fact	Supporting Evidence
269. NHTSA denied the CFAS petition.	269. Pittle Dec., ¶ 50.
270. CU learned of NHTSA's 1988 decision to deny the CFAS petition in early September 1988.	270. Pittle Dec., ¶ 50.
271. After the CFAS petition was denied, Conkling was assigned to work with the Auto Test Division staff in analyzing the decision and preparing a response.	271. Conkling Dec., ¶ 16.
272. CU's engineers and researches analyzed NHTSA's published denial and disagreed substantively with NHTSA's ruling and written decision. CU disagreed with any implication in the written decision that CU's tests did not have a scientific basis or a link to real work crash avoidance.	272. Pittle Dec., ¶ 50.

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Uncontroverted Fact	Supporting Evidence
273. On September 18, 1988, Conkling wrote a memo to Landau, Knoll, and Pittle containing the analysis	273. Conkling Dec., ¶ 17; Pittle Dec., ¶ 50; Exh. 9 (CU007249-CU007261).
274. The analysis showed that in CU's opinion, NHTSA was improperly interpreting accident data.	274. Conkling Dec., ¶ 17; Pittle Dec., ¶ 50; Exh 9 (CU007249-CU007261).
275. In November of 1988, CU published an article expressing its disagreement with NHTSA's 1988 findings on the Samurai.	275. Pittle Dec., ¶ 50; Exh 10; Conkling Dec., ¶ 17.
276. CU believed then and believes now that NHTSA was mistaken in its failure to open a defect investigation concerning the Samurai's rollover propensity.	276. Pittle Dec., ¶ 50.

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CU'S HISTORY OF DISAGREEMENT WITH NHTSA

277. CU's disagreement with NHTSA goes back to 1978 when NHTSA decided against opening a safety investigation of the Dodge Omni and Plymouth Horizon which CU had rated "Not Acceptable" because of their performance in both the long course and another test called the free control maneuver.	277. Knoll Dec., ¶¶ 97-98.
278. CU believes that NHTSA did not reject the validity of its tests but simply did not believe that CU's tests were not sufficient evidence to open a defect investigation.	278. Knoll Dec., ¶ 98; Exh. 81 (CU005685-CU005695).
279. CU repeated its disagreement with NHTSA and its continuing belief in the validity of its test in subsequent issues of *Consumer Reports*: "CU believes NHTSA should initiate a full defect investigation" (August 1978); "Federal safety regulations do not as yet cover vehicles handling as such, and	279. Exh 139 (CU005630); Exh. 140 (CU005631-CU005632); Exh. 141 (CU005648-CU005649).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) the NHTSA has consistently avoided involvement in such subjective areas" (October 1978); "And the [NHTSA] whose own test results were identical to ours, had refused to interpret those results as a safety problem requiring a mandatory recall" (October 1979).	
280. The 1988 article regarding the Samurai refers to NHTSA as a "reluctant watchdog."	280. Exh. 105 (CU007353-CU007361).
281. CU reiterated its disagreement with NHTSA over vehicle standards in the September 1997 issue of Consumer Reports: "Over the last 18 years, NHTSA has refused to investigate other SUVs that may have posed a risk of rollover. . . . The agency should now develop a safety standard to evaluate emergency handling and detect rollover problems."	281. Exh. 182 ("Government Won't Investigate Isuzu Trooper" *Consumer Reports* (Sept. 1997)).

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SUZUKI SETTLES WITH ATTORNEYS GENERAL, MARCH 1989

Uncontroverted Fact	Supporting Evidence
282. In March of 1989, CU learned that Suzuki settled the action brought by the Attorneys General of seven states in which the Attorneys General charged that Suzuki had issued false and misleading advertising for the Samurai involving its safety and rollover danger.	282. Pittle Dec., ¶ 56.
283. Under the settlement agreement with the Attorneys General, Suzuki agreed to pay $200,000 and include a warning in future advertising regarding potential rollovers.	283. Exh. 17 (CU005157).

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CU GIVES FAVORABLE REVIEW TO SUZUKI PRODUCTS

Uncontroverted Fact	Supporting Evidence
284. Since 1988, CU has tested and reported on other Suzuki Products, including the Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, and the Esteem and Geo models manufactured by Suzuki such as the Tracker.	284. Pittle Dec., ¶ 108; Exhs. 117, 118.
285. The Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, the Esteem, and the Tracker were put through the short course and all passed. The Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, the Esteem, and the Tracker were all judged acceptable by CU.	285. Pittle Dec., ¶ 108.
286. In June 1989, CU said of the Suzuki Sidekick in Consumer Reports: "The Geo Tracker/Suzuki Sidekick is exactly the vehicle the Suzuki Samurai	286. Pittle Dec., ¶ 108; Exh 82 (CU003182-CU003191).

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Uncontroverted Fact	Supporting Evidence
(Cont'd) should have been. It's small and nimble and handles almost like a passenger car on the road. It's fuel economy and braking are top notch."	
287. Suzuki never complained that CU ran the Suzuki Sidekick, the Sidekick Sport, the Swift, X-90, the Esteem, and the Tracker through the short course.	287. Pittle Dec., ¶ 108.
AWARENESS OF DISTRICT COURT'S DECISION IN MALAUTEA, EARLY 1992	
291. CU became aware of the *Malautea* decision early in 1992.	291. Pittle Dec., ¶ 64.
292. The *Malautea* decision bolstered CU's existing belief in the validity of CU's tests and CU's interpretation of the results.	292. Pittle Dec., ¶ 66.

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Uncontroverted Fact	Supporting Evidence
293. CU began work on a report on the *Malautea* decision in March 1992. Pittle edited a draft of the article on March 10, 1992. CU's Library	293. Pittle Dec., ¶ 64; Exh. 21 (CU010994-CU010997); Exh. 22 (CU010999-CU011000).
294. *Consumer Reports* published a one page report on the *Malautea* decision in the May 1992 issue of Consumer Reports. The report was entitled "Did Suzuki Ignore Warnings About Samurai? Court Papers Say Yes."	294. Pittle Dec., ¶ 64; Exh. 20.
295. Suzuki never complained to CU or sued CU about the May 1992 article.	295. Pittle Dec., ¶ 64.
ELEVENTH CIRCUIT'S DECISION IN MALAUTEA, 1993	
298. CU was advised that following this affirmance of the default judgment, Suzuki entered into a confidential settlement with Mr. Malautea.	298. Pittle Dec., ¶ 67.

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Uncontroverted Fact	Supporting Evidence
299. The Eleventh Circuit's affirmance reinforced CU's belief in the truth of CU's reports on the Samurai.	299. Pittle Dec., ¶ 67.
300. Consumer Reports reported on the affirmance in a May 9, 1997 press release.	300. Pittle Dec., ¶ 67; Exh. 120.

SUZUKI TERMINATES SALES OF SAMURAI IN U.S., 1995

305. In 1995, Suzuki terminated sales of the Samurai in the United States.	305. Exh.180 (Chandler Deposition, 101:1-12).

CU'S EXPERIENCE WITH THE SHORT COURSE SINCE THE SAMURAI TESTING IN APRIL 1988

306. From April 1988 to August 1996, CU tested 48 different models of SUVs, compact trucks, and minivans on the short course.	306. Knoll Dec., ¶ 92.
307. Other than the Suzuki Samurai in 1988 and the Isuzu Trooper in 1996, none of the other 46 vehicles	307. Knoll Dec., ¶ 92.

Appendix D

Uncontroverted Fact	**Supporting Evidence**
(Cont'd) tested through August 1996 demonstrated a rollover propensity so serious as to warrant being rated "Not Acceptable."	
308. In 1989, the Ford Bronco II lifted two wheels during CU's short course testing.	308. Knoll Dec., ¶ 93.
309. The Bronco II lifted its wheels slowly and not as high as the Samurai.	309. Knoll Dec., ¶ 93.
310. CU judged the Bronco II's emergency handling as poor and recommended consumers avoid buying it.	310. Knoll Dec., ¶ 93.
311. CU did not rate the Bronco II "Not Acceptable" because CU believed the wheel lift was less severe and more easily recoverable than the Samurai.	311. Knoll Dec., ¶ 93.

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Uncontroverted Fact	Supporting Evidence
312. In 1992, CU tested the 1992 Mitsubishi Montero and the 1992 Isuzu Trooper.	312. Knoll Dec., ¶ 94.
313. Both the 1992 Mitsubishi Montero and the 1992 Isuzu Trooper had an overall pattern of making clean runs or sliding out, except for a single run with a low level tip up in each vehicle.	313. Knoll Dec., ¶ 94.
314. CU found there was no pattern of repeated tip up on either the 1992 Mitsubishi Montero or the 1992 Isuzu Trooper so CU did not rate the vehicles' handling as poor.	314. Knoll Dec., ¶ 94.
315. As of April 1999, CU has tested a total of 77 vehicles on the short course.	315. Knoll Dec., ¶ 92.
316. As of April 1999, only the Samurai and Trooper were rated "Not Acceptable" by CU based on its testing.	316. Knoll Dec., ¶ 92.

Appendix D

Uncontroverted Fact	Supporting Evidence
318. CU has referenced the historical fact of its 1988 "Not Acceptable" rating of the Samurai on at least 24 occasions during the period between July 1988 and the middle of 1995.	318. Pittle Dec., ¶ 69.
319. CU has referenced the historical fact of the 1988 "Not Acceptable" rating of the Samurai in Consumer Reports, its annual buying guide issues, and in various editions of Consumers Union's books on new and used cars.	319. Pittle Dec., ¶ 69; Exh. 137.
NO COMPLAINT FROM SUZUKI ABOUT REPUBLICATIONS	
321. Not once during the years from 1988 to 1995 seven to CU about any of those republications, nor did Suzuki bring suit against CU during that period.	321. Pittle Dec., ¶ 69; Karpatkin Dec., ¶ 28.
322. Suzuki's silence in the face of these reports strengthened CU's belief in the validity of CU's reports on the Samurai.	322. Pittle Dec., ¶ 69.

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REPUBLICATIONS WITHIN THE STATUTE OF LIMITATIONS PERIOD, APRIL 1994 TO APRIL 1996

Uncontroverted Fact	Supporting Evidence
323. In April 1995, CU issued a Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/Consumer Reports." (ca. April 1995). The Card bore a photograph depicting a Suzuki Samurai tipped up on outriggers.	323. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2).
324. In November 1995, CU published the following in its Electronic File, *Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center*, 1996 Edition (CD-ROM): "'In our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore	324. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 93, Exh. E.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) judge it Not Acceptable.'" "With those words, CONSUMER REPORTS made worldwide headlines in the summer of 1988. CONSUMER REPORTS' engineers tested the 1988-model Samurai, along with three other sport utility vehicles at our auto-test facility in Connecticut. During moderate-speed emergency maneuvers designed to duplicate the kind of evasive action a driver might take to avoid, say, a child darting into traffic, the Samurai began to roll over onto its side. "The 1998 Suzuki Samurai demonstrated a design so dangerous that it put people's lives in jeopardy. Once CONSUMER REPORTS' tests revealed this critical safety hazard, sales of sales of this once-popular car plummeted."	
325. In November 1995, CU published in its Electronic Files, Reviews of Suzuki Samurai, model years 1987 through 1994, in Consumer	325. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to

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Uncontroverted Fact	Supporting Evidence
(Cont'd)	
Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1996 Edition (CD-ROM) (ca. Nov. 1995). The File stated: "Rated Not Acceptable because of its tendency to roll over during a hard turn." "Safety Alert" linking to file, "How Consumer Reports Protects You," supra.	Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 94.
326. In 1996, CU published Electronic File, Consumers Union, "Summary Judgement," Compuserve (ca. 1996). The File stated: "the Suzuki Samurai was "Rated Not Acceptable because of its tendency to roll over during a hard turn."	326. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 91.

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Uncontroverted Fact	Supporting Evidence
327. In January 1996, CU published a column, "Memo to Members," Consumer Reports (Jan. 1996). The column stated: "Product safety is still a problem. The number of watchdogs has increased over the years, and Government agencies have taken a goodly number of unsafe products off the market. Yet we still find products that are unsafe: From kerosene heaters to the Suzuki Samurai to safety seats, CONSUMER REPORTS has called them out – and our work goes on."	327. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 87, Exh. C.
328. In January 1996, CU published an article, "It's Our Anniversary," Consumer Reports (Jan. 1996). The article stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS	328. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to

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Uncontroverted Fact	Supporting Evidence
(Cont'd) discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	Interrogatory No. 2); First Amended Complaint, ¶ 88, Exh. C.
329. In January 1996, CU published Electronic File, Consumers Union, "It's Our Anniversary," America On-Line (commencing Jan. 1996). The File stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the	329. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 89, Exh. D.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	
330. In January 1996, CU published Electronic File, Consumers Union, "It's Our Anniversary," Compuserve (commencing ca. Jan. 1996). The File stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power	330. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumer Union of United States, Inc.'s Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 90.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	
SUZUKI FILES SUIT, APRIL 1996	
331. Suzuki filed this action against CU on April 11, 1996, eight years after CU originally published the July 1988 article.	331. Complaint For Damages for Libel and Product Disparagement, For Injunctive Relief Under Cal. Bus. & Prof Code § 17200, And For Declaratory Relief, filed April 11, 1996.
INFORMATION MADE AVAILABLE TO CU FOLLOWING LAWSUIT, MAY 1996	
338. CU knew of no testing and reports issued by foreign governments other than that performed by Great Britain until after April 11, 1996, when Suzuki filed its lawsuit. Suzuki did not bring these findings to the attention of CU before it filed its complaint.	338. Pittle Dec., ¶¶ 103-104.

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ANOTHER VEHICLE TIPS UP ON THE SHORT COURSE, JUNE 1996

Uncontroverted Fact	Supporting Evidence
339. In June, July and August of 1996, CU conducted a series of tests on four different 1996 model SUVs, the Isuzu Trooper/ Acura SLX, the Toyota 4Runner, the Nissan Pathfinder, and the Chevrolet Tahoe, as well as a new 1995 Isuzu Trooper.	339. Knoll Dec., ¶ 96; Pittle Dec., ¶ 76.
340. None of the vehicles tested in this period were equipped with outriggers because CU did not expect any tip up or rollover with the large type of SUVs.	340. Pittle Dec., ¶ 76.
341. On June 6, 1996, a slight tip up of the Isuzu Trooper occurred in the long course test.	341. Pittle Dec., ¶ 76.
342. On June 6, 1996, the 1996 Isuzu Trooper lifted both inside wheels during the short course test.	342. Pittle Dec., ¶ 76.

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Uncontroverted Fact	Supporting Evidence
343. CU conducted additional testing of these vehicles on June 26, 1996 and on July 10, 1996.	343. Pittle Dec., ¶ 76.
344. The performance of both the 1995 and 1996 Trooper and the Acura SLX led Knoll and the Auto Test Engineers to recommend that the vehicle be rated "Not Acceptable."	344. Knoll Dec., ¶ 96; Pittle Dec., ¶ 76.
345. Dr. Pittle agreed that the 1995 Isuzu Trooper and 1996 Isuzu Trooper/Acura SLX warranted a rating of "Not Acceptable."	345. Pittle Dec., ¶ 76.
THE AMMERMAN DECISION	
348. The *Ammerman* trial court referred to auto manufacturers as using emergency maneuvers to evaluate vehicles for rollover propensity.	348. Exh. 136, p.5; 167, p.5.

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Uncontroverted Fact	Supporting Evidence
349. The *Ammerman* ruling solidified CU's belief in the validity of CU's short course.	349. Knoll Dec., ¶ 42.
AUGUST 20, 1996 PRESS CONFERENCE	
364. Based upon CU's testing of the Isuzu Trooper/Acura SLX, and the confirmation of the tests' validity provided by Allen's opinion letter, CU held a press conference on August 20, 1996 to announce its findings regarding the Trooper/SLX and to announce that these vehicles would be rated "Not Acceptable" in the October 1996 issue of Consumer Reports.	364. Pittle Dec., ¶ 80.
365. At the August 20, 1996 press conference, CU referred to its 1988 Suzuki Samurai findings as a part of its report on the 1996 Isuzu Trooper/ Acura SLX in order to place the Trooper matter in proper historical context.	365. Pittle Dec., ¶ 110; Karpatkin Dec., ¶ 28.

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Uncontroverted Fact	**Supporting Evidence**
366. The Trooper was the first motor vehicle rated "Not Acceptable" by CU as a result of avoidance maneuver testing since 1988.	366. Pittle Dec., ¶ 110; Karpatkin Dec., ¶ 28.
369. At no time has CU had any doubt concerning the truth of any statements about the Suzuki Samurai in the August 20, 1996 press conference or the article in the October 1996 issue of Consumer Reports concerning the Isuzu Trooper/Acura SLX.	369. Pittle Dec., ¶ 107; Knoll Dec., ¶¶ 109, 113; Karpatkin Dec., ¶ 23; Landau Dec., ¶ 57; Sheehan Dec., ¶ 30; Small Dec., ¶¶ 25, 26; Wood Dec., ¶¶ 42, 43.
370. At no time has Pittle ever had any doubt concerning the truth of any statements in any articles, press conferences, or other material published by CU regarding the Suzuki or the Samurai.	370. Pittle Dec., ¶ 107.

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Uncontroverted Fact	Supporting Evidence
371. CU believed and continues to believe that all of its statements are true, fair, and accurate.	371. Pittle Dec., ¶ 107; Knoll Dec., ¶¶ 109, 113; Karpatkin Dec., ¶ 23; Landau Dec., ¶ 57; Sheehan Dec., ¶ 30; Small Dec., ¶¶ 25, 26; Wood Dec., ¶¶ 42, 43.

CU FILES PETITION WITH NHTSA FOR DEFECT INVESTIGATION OF ISUZU TROOPER/ACURA SLX, AUGUST 1996

372. On August 20, 1996, CU filed petitions with NHTSA seeking a defect investigation of the Trooper/SLX and also requesting the development of a standard that would produce meaningful, comparative data on the emergency handling characteristics of different makes and models of SUVs.	372. Pittle Dec., ¶ 81; Knoll Dec., ¶ 96.
373. CU filed the defect petition and the rulemaking petition with NHTSA because CU believes in its tests and	373. Pittle Dec., ¶ 83; Knoll Dec., ¶ 96.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) the public importance of its safety judgments and the need for safer vehicles.	
374. At the time CU filed the defect petition, CU knew NHTSA would likely deny the petition and again criticize CU's testing.	374. Pittle Dec., ¶ 81.
CU'S NHTSA SUBMISSIONS REGARDING THE TROOPER	
375. In October 1996, while preparing CU's submissions to NHTSA regarding rollover problems with SUVs in general and the Trooper/ SLX in particular, CU obtained the documents submitted to NHTSA by Suzuki in the 1988 petition by CFAS for a Samurai defect investigation.	375. Pittle Dec., ¶ 84.

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Uncontroverted Fact	**Supporting Evidence**
376. In reviewing the documents submitted to NHTSA by Suzuki in 1988, CU learned that (NHTSA was misled by Suzuki in 1988 as to the scientific and real-world nature of CU's short course avoidance maneuver test) and that Suzuki had not disclosed to NHTSA GM's earlier rejection of Suzuki's request for GM to market the Samurai.	376. Pittle Dec., ¶ 84.
377. On October 10, 1996, CU submitted to NHTSA full and complete documentation of its Summer 1996 testing of SUVs, including the tests of the Trooper/SLX.	377. Pittle Dec., ¶ 85.
378. On December 23, 1996, CU filed voluminous materials in support of its petition for a defect investigation of the Trooper/ SLX and for development of an emergency handling test for SUVs.	378. Pittle Dec., ¶ 86; Exh. 30 (CU025024-CU025092); Exh 31 (CU022943-CU023387).

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Uncontroverted Fact	Supporting Evidence
379. The materials submitted to NHTSA by CU on December 23, 1996 included detailed engineering analyses by independent engineering experts.	379. Pittle Dec., ¶ 86; Exh. 30 (CU025024-CU025092); Exh 31 (CU022943-CU023387).
380. CU's December 23, 1996 submission to NHTSA also included the depiction of similar maneuvers in commercials by auto makers such as Ford, Mercedes, Cadillac, Chevrolet and Toyota in order to sell cars to the public.	380. Pittle Dec., ¶ 87; Exh. 30 (CU025024-CU025092); Exh 31 (CU022943-CU023387).
381. Chrysler and Ford use the CU long course and short course avoidance maneuvers tests on their vehicles.	381. Exhs. 28, 29, 178, 179.
382. On March 19, 1997, Suzuki filed an opposition to CU's petition regarding Isuzu.	382. Pittle Dec., ¶ 95.

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Uncontroverted Fact	Supporting Evidence
383. On April 10, 1997, CU filed a response to Suzuki's filing.	383. Exh. 33 (CU024940-CU025023).
384. CU's work on the Isuzu submissions to NHTSA further reinforced its belief that CU's tests are scientific and valid and that the ratings of the Samurai and the Trooper/ SLX were justified and appropriate.	384. Pittle Dec., ¶ 96.
385. The Insurance Institute for Highway Safety and the Advocates for Highway safety submitted letters supporting CU's petition.	385. Exh. 123; Exh. 124.
386. On May 14, 1997, NHTSA granted CU's rulemaking petition to commence work on an emergency handling standard.	386. Exh. 130 (CU507379-CU507383).

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Uncontroverted Fact	Supporting Evidence
387. On July 24, 1997, NHTSA denied CU's 1996 petition for defect investigation of the Isuzu Trooper/Acura SLX.	387. Knoll Dec., ¶ 100.
388. NHTSA also released a report by its Vehicle Research and Test Center entitled Tests Concerning Rollover Propensity of 1995-96 Isuzu Trooper and 1996 Acura SLX (May 1997) which documented the results and analysis of testing performed on the Trooper/ SLX in connection with CU's petition.	388. Knoll Dec., ¶ 100.
389. After receiving NHTSA's decision, Knoll and other employees of CU and CU's consultants and counsel analyzed NHTSA's Petition Analysis, the technical VRTC Report, and other documents in NHTSA's files in an effort to understand the decision.	389. Knoll Dec., ¶ 101; Pittle Dec., ¶ 99.

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Uncontroverted Fact	Supporting Evidence
391. CU believes that NHTSA's decision reflected an inherent bias against identifying a defect based on evidence of rollover propensity.	391. Knoll Dec., ¶ 101.
392. CU believes that NHTSA's decision did not establish that CU's tests lacked validity.	392. Knoll Dec., ¶ 101.
394. CU believes that NHTSA's test results, including tip ups, are not dissimilar to CU's test results. CU believes NHTSA's decision did not establish that CU's tests lacked validity, but rather reflected a difference in the interpretation of the results of the testing.	394. Pittle Dec., ¶ 105; Knoll Dec., ¶ 101.
395. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's peer vehicle parameter was	395. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) flawed because the parameters were related to static rather than dynamic stability of the vehicles an peer vehicle.	
396. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's analysis of complaints to the Office of Defect Investigations was flawed because the database that NHTSA used reported primarily component malfunctions, rather than a failure of a vehicle's design.	396. Knoll Dec., ¶ 102.
397. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA'S analysis of Consumers Union's computer simulations of the Trooper's dynamic performance (using a	397. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) program called VDANL) was flawed because NHTSA presented no information indicating that changes in the program would have made any difference in the outcome of the simulations provided to it.	
398. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's oversteer/understeer analysis was flawed because NHTSA's own test data clearly show evidence of a potential oversteer problem in the Trooper/SLX.	398. Knoll Dec., ¶ 102.
399. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NSTSA's driver variability analysis was	399. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) flawed because the Office of Defect Investigations' observation regarding the different driver strategies for completing the CU course is consistent with the data from the statistical analysis undertaken by Ian Jones that CU included as a part of its December 23, 1996 submission to NHTSA.	
400. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's vehicle test comparison was flawed because NHTSA chose an incorrect peer vehicle. NHTSA did not choose several peer vehicles from different manufacturers as is its usual practice.	400. Knoll Dec., ¶ 102.
401. CU believes NHTSA was incorrect in its decision on the Isuzu	401. Knoll Dec., ¶ 102.

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) petition because CU believes NHTSA's outrigger effects analysis was flawed because no tests described in the Petition Analysis or the VRTC Report were performed without outriggers on a course with the same dimensions as the Consumers Union short course at speeds high enough to demonstrate an outrigger effect. Consumers Union believes that outriggers lower the vehicle's center of gravity and therefore make a slight difference in performance on the short course — favoring the stability of the test vehicle.	
402. CU believes NHTSA was incorrect in its decision on the Isuzu petition because CU believes NHTSA's analysis of the reliability of Consumers Union's	402. Knoll Dec., ¶ 102.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) test was flawed because CU believes NHTSA did not analyze Consumers Union's data using appropriate statistical techniques that are standard in scientific research.	
403. CU disagrees with NHTSA's reliance upon Fatal Accident Reporting System (FARS) data in its analysis of Consumers Union's Trooper petition.	403. Knoll Dec., ¶ 102.
REPUBLICATIONS AFTER SUZUKI FILED SUIT, APRIL 1996 TO PRESENT	
404. In June 1996, CU published an article, "How safe are SUVs?," Consumer Reports (June 1996). The article stated: "The old Suzuki Samurai had a tendency to tip over in sharp turns – so much that we rated it Not Acceptable when we tested it in 1988. Because of that	404. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	Supporting Evidence
(Cont'd) experience, instituted an additional, tighter emergency-avoidance test for SUVs. All four vehicles in this month's report passed that test and all our other handling tests without incident."	
405. In August 1996, CU issued a Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/Consumer Reports." (ca. August 1996). The Card bore a photograph depicting a Suzuki Samurai tipped up on outriggers.	405. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
406. On August 20, 1996, CU distributed a videotape to television news media. The video segment depicting a Suzuki Samurai tipping up on outriggers, filmed on or about May 12, 1988.	406. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd)	
	Interrogatories, Response to Interrogatory No. 2).
407. On August 20, 1996, CU distributed a Background Paper, "Consumer Reports' Avoidance Maneuver" distributed at a press conference. The Paper stated: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver."	407. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
408. On August 20, 1996, CU published an article, "How the two SUVs failed our avoidance test" and distributed it to the press. The article stated: "Since 1988,	408. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's

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Uncontroverted Fact	Supporting Evidence
(Cont'd) when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically, and it would have rolled over without our outriggers. We rated it Not Acceptable."	Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint,¶ 100, Exh. G.
409. On August 20, 1996, CU distributed to the press an article, "Not Acceptable: Isuzu Trooper/Acura SLX" ("pre-press copy.") The article stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	409. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 99, Exh. G.

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Uncontroverted Fact	Supporting Evidence
410. At a Press Conference on August 20, 1996, CU stated: "[T]hese outriggers have little or no effect on the performance of the vehicle. . . ." "The first time we saw this problem [of rollover] was in 1988 with the Suzuki Samurai." "We evaluated the Suzuki Samurai in 1988. That was the first car we had ever seen that went up on two wheels like this, and we called it Not Acceptable."	410. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
411. In an interview of CU representatives by MSNBC on August 20, 1996, CU representatives stated: "In the last eight years, since we have been running this particular short course [i.e., the modified maneuver], only two cars have gone on two wheels like this. One was the Suzuki	411. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Samurai in 1988. . . . We issued a warning. We rated that car Not Acceptable. It did the same thing the Trooper did. . . . In the intervening eight years, 46 other cars have gone through with no problem."	Complaint, ¶ 101, Exh. H.
412. Consumer Union, Petition for Rulemaking, Defect Investigation and Appropriate Enforcement to NHTSA, dated Aug. 20, 1996 stated: "Since it found in its 1988 tests a similar rollover propensity of the Suzuki Samurai, Consumers Union has tested 47 other sport-utility vehicles, light trucks and minivans under these same conditions. The Isuzu Trooper/Acura SLX twins are the first since the 1988 tests to demonstrate this propensity to a degree that Consumers	412. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	Supporting Evidence
(Cont'd) Union has judged the vehicles 'Not Acceptable.'" The "pre-press" copies of the "Not Acceptable" and "How the two SUVs failed our avoidance test" articles, described above, were attached to the Petition.	
413. In October, 1996, CU published an article, "Special Report. SUV Safety. Not Acceptable. Isuzu Trooper/Acura SLX," Consumer Reports (Oct. 1996). The article stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	413. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 102; Exh. H.

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Uncontroverted Fact	**Supporting Evidence**
414. In October 1996, CU published an article, "How the two SUVs failed our avoidance test," Consumer Reports (Oct. 1996). The article stated: "Since 1988, when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically, and it would have rolled over without our outriggers. We rated it Not Acceptable."	414. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 103, Exh. I.
415. In October 1996, CU issued a Fundraising Card, captioned, "T.I.P.s.," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/Consumer Reports." (ca. October 1996). The card bore a photograph depicting a Suzuki Samurai tipped up on outriggers.	415. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	Supporting Evidence
416. In November 1996, CU published a column, "Memo to Members," Consumer Reports (Nov. 1996). The column stated: "One of the SUVs that failed [the avoidance maneuver] was the Suzuki Samurai in 1988."	416. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
417. In November 1996, CU published Electronic Files, Review of Suzuki Samurai, model years 1987 through 1995, in Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1997 Edition (CD-ROM) (ca. Nov. 1996). The Files stated: "Rated Not Acceptable because of its tendency to roll over during a hard turn."	417. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 107, Exh. Q.

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Uncontroverted Fact	Supporting Evidence
418. In January 1997, CU published on the Web "Timeline," which stated: "Summer 1988: "While subjecting the Suzuki Samurai sport-utility vehicle (SUV) to the Consumers Union avoidance-maneuver test, the vehicle tips up on two wheels (without safety out-riggers) and threatens to overturn. In order to evaluate rollover propensity, CU shortens the length of the course slightly and makes the turning angle sharper, as it would be in a suburban or urban driving situation. The Samurai tips up severely and repeatedly (with safety outriggers), although three other SUVs remain stable throughout this 'short course' avoidance-maneuver test. As a result of its dangerous performance, Consumer Reports rates the Suzuki Samurai 'Not Acceptable'	418. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2); First Amended Complaint, ¶ 106, Exh. P.

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Uncontroverted Fact	Supporting Evidence
(Cont'd) in its July 1988 issue." "Rhoda H. Karpatkin, CU's president [said,] 'From the start, we have been convinced that Suzuki's meritless claims are an effort to prevent us from continuing to speak out when we find a car is unsafe. We remain committed to testing cars and informing the public fully and objectively about their safety and performance.'"	
419. In July 1997, CU issued a Press Release, "Auto Safety Agency Fails Again to Tackle Rollover Hazard," which stated:" In 1988, and again in 1996, NHTSA turned down petitions to investigate the Suzuki Samurai, a vehicle that showed serious rollover problem in our tests, and that has been involved in 147 deaths and some	419. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) 7000 injuries. ""Since 1988, we have tested 57 sport utility vehicles, minivans, and compact trucks on our special emergency-handling course, and only the Trooper, the Acura SLX, the Suzuki Samurai, and the Bronco II have shown a significant tendency to tip."" Consumer Union has been testing cars for over 60 years. Our work has stood the test of time and the scrutiny of the marketplace: Tens of millions of American consumers have found our automobile information reliable, and justifiably so. When we find a major safety problem in a car which happens rarely we take it very seriously, and do everything we can to alert consumers. We have also done our best to get the government to	

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Uncontroverted Fact	Supporting Evidence
(Cont'd) take appropriate steps. The government's failure to act on the Trooper/SLX and other highly rollover-prone vehicles is a serious failure, and a disservice to consumers. We are independent and objective. We stand by our tests, and will continue to alert the public to the safety problem these vehicles pose."	
420. In July 1997, CU published on the World Wide Web, "Auto Safety Agency Fails Again to Tackl [sic] Rollover Hazard," <http://www.consumer.org/cunhtsa.html> (since ca. July 25, 1997). [Same as press release]	420. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
421. In July 1997, CU published on the World Wide Web World Wide Web, "Auto Safety Agency Fails Again to Tackle Rollover	421. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Hazard," <http://www.prnewswire.com/> at Company News On Call: Consumer Reports/Consumers Union (commencing ca. July 25, 1997). [Same as press release]	United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).
422. In September 1997, CU published a Column, "Frontlines. Safety Update. Government Won't Investigate Isuzu Trooper," Consumer Reports (Sept. 1997). The column stated: "Since 1988 we have published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the Suzuki Samurai showed such a marked tendency to tip . . .	422. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Uncontroverted Fact	**Supporting Evidence**
(Cont'd) ". . . in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."	
423. In September 1997, CU published "Government Won't Investigate Isuzu Trooper," <www.consumerreports.org/Categories/Cars Trucks/Reports/9709trop.htm>, Consumer Reports Online (since ca. Sept. 1997), which stated: "Since 1988 we have published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the	423. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

Appendix D

Uncontroverted Fact	**Supporting Evidence**
(Cont'd) Suzuki Samurai showed such a marked tendency to tip . . . "... in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."	
424. In November 1997, CU published an Article, "How Safe Are SUVs?,: Consumer Reports 60 (Nov. 1997). The article stated: "Of the 61 SUVs, minivans, and pickup trucks we've tested in the last nine years, only two SUVs have tipped up so severely that we judged them Not Acceptable: the 1988 Suzuki Samurai and the 1995-96 Isuzu Trooper and its twin, the 1996 Acura SLX."	424. Exh. 166 (Supplemental Response of Plaintiff Suzuki Motor Corporation to Consumers Union of United States, Inc's Second Set of Interrogatories, Response to Interrogatory No. 2).

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Based on the foregoing Uncontroverted Facts, the Court now makes its,

CONCLUSIONS OF LAW

1. The statute of limitations for product disparagement is 2 years.[2/]	1. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 14:11-13; *Guess v. Superior Court*, 176 Cal.App.3d 473, 479 (1986).
2. Suzuki can only claim product disparagement dating back to April 1994.	2. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 14:11-13.
3. To prove product disparagement, Suzuki must establish: 1) publication of a statement of and concerning the quality of a product;	3. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7; *Blatty v.*

2. This conclusion of law is made solely for the purposes of CU's Motion for Summary Judgment.

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(Cont'd) 2) falsity; 3) malice; 4) special damages.	*New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986); *Guess v. Superior Court*, 176 Cal.App.3d 473, 479 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d 547, 572 (1989).
4. To prove violation of California Business and Professions Code § 17200, Suzuki must establish 1) publication of a statement of and concerning the quality of a product; 2) falsity; 3) malice; 4) defendant profited from the publication of the statement.	4. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7, 20:19-28; *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986).
5. First Amendment standards apply to Suzuki's product disparagement claim.	5. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4: 1-7; *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990); *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d, 548, 576 (3rd Dist. 1989).

6. First Amendment standards apply to Suzuki's claim under California Business & Professions Code § 17200.	6. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4: 1-7, 20:19-28; *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1042 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.3d, 548, 576 (3rd Dist. 1989).
7. CU is a media defendant.	7. Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:5-6; *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 493 n.8.
8. Suzuki is a "limited purpose public figure."	8. Exh. 149; Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:3-5; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244 (1984).

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9.	Where plaintiff is a public figure, proof of actual malice is required.	9.	*New York Times v. Sullivan*, 376 U.S. 254, 280 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Bose v. Consumers Union of United States*, 466 U.S. 485, 511 n. 30 (1984).
10.	Because Suzuki is a limited purpose public figure, Suzuki must prove CU acted with actual malice.	10.	Exh. 149; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 256 (1984).
11.	Proof of actual malice is required when the statement is of and concerning a matter of public interest.	11.	*Melaleuca Inc. v. Clark*, 66 Cal. App.4th 1344, 1355 (1998); *Nizam-Aldine v. City of Oakland*, 47 Cal.App.4th 364, 373 (1996); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).
12.	Product safety is a matter of public concern.	12.	*Quantum Electronics Corp. v. Consumers Union*, 881 F.Supp. 753, 764 (D.R.I. 1995); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3d Cir. 1980).

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13. Because Suzuki is a public figure and product safety is a matter of public concern, Suzuki must prove the CU acted with actual malice.	13. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974); *Quantum Electronics Corp. v. Consumers Union*, 881 F.Supp. 753, 764 (D.R.I. 1995); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).
14. Mere negligence or extreme departure from accepted journalism standards does not constitute actual malice.	14. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 111 S.Ct. 2419, 2429 (1991).
15. Evidence of a pecuniary motive cannot prove actual malice.	15. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); Sack, *Libel, Slander & Related Problems*, (2d ed. 1984) p. 295.
16. The test for actual malice is a subjective test under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue.	16. *Alioto v. Cowles Communications, Inc.*, 430 F.Supp. 1363, 1365-1366 (N.D.Cal. 1977); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984).

17. "Actual malice" is with knowledge of falsity or with reckless disregard for the truth or falsity of the statement.	17. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).
18. To prove actual malice, the plaintiff must show that the defendant in fact entertained serious doubts as to the truth of the publication.	18. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
19. At the summary judgment stage, the First Amendment requires that in addition to proving the challenged statements were false, the plaintiff bears the higher burden of demonstrating that the defendant acted with actual malice by clear and convincing evidence.	19. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
20. CU's actual belief at the time it published and republished its statements about the Samurai has not been shown to consist of an intent to act with actual malice.	20. *Alioto v. Cowles Communications, Inc.*, 430 F.Supp. 1363, 1365-1366 (N.D.CAl. 1977); *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 257 (1984).

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21. When CU published and republished its statements about the Samurai, CU has not been shown to have acted with reckless disregard for the truth or falsity of its statements about the Samurai.	21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964).
22. When CU published and republished its statements about the Samurai, CU has not been shown to have entertained any doubt as to the truth of the statements it made about the Samurai.	22. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
24. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in April 1995 when it published 1995, Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/ Consumer Reports." bearing a photograph depicting a Suzuki Samurai tipped up on outriggers.	24. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

25. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1995, when CU published the following in its Electronic File, *Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center*, 1996 Edition (CD-ROM): "'In our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore judge it Not Acceptable.'" "With those words, CONSUMER REPORTS made worldwide headlines in the summer of 1988. CONSUMER REPORTS' engineers tested the 1988-model Samurai, along with three other sport utility vehicles at our auto-test facility in Connecticut. During moderate-speed	25. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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emergency maneuvers designed to duplicate the kind of evasive action a driver might take to avoid, say, a child darting into traffic, the Samurai began to roll over onto its side.
"The 1998 Suzuki Samurai demonstrated a design so dangerous that it put people's lives in jeopardy. Once CONSUMER REPORTS' tests revealed this critical safety hazard, sales of sales of this once-popular car plummeted."

26. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1995, when CU published in its Electronic Files, Reviews of Suzuki Samurai, model years 1987 through 1994, in Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1996 Edition (CD-ROM) (ca. Nov. 1995) which stated: "Rated Not	26. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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Acceptable because of its tendency to roll over during a hard turn." "Safety Alert" linking to file, "How Consumer Reports Protects You," supra.	
27. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in 1996, when CU published Electronic File, Consumers Union, "Summary Judgement," Compuserve (ca. 1996) which stated: "the Suzuki Samurai was "Rated Not Acceptable because of its tendency to roll over during a hard turn."	27. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
28. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published a column, "Memo to Members," Consumer Reports which stated: "Product safety is still a problem. The number	28. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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of watchdogs has increased over the years, and Government agencies have taken a goodly number of unsafe products off the market. Yet we still find products that are unsafe: From kerosene heaters to the Suzuki Samurai to safety seats, CONSUMER REPORTS has called them out – and our work goes on."

29. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published an article, "It's Our Anniversary," Consumer Reports which stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products,

29. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	
30. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published Electronic File, Consumers Union, "It's Our Anniversary," America On-Line, which stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	30. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

31. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1996, when CU published Electronic File, Consumers Union, "It's Our Anniversary," Compuserve which stated: "1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers that the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable."	31. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
32. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in June 1996,	32. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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when CU published an article, "How safe are SUVs?," Consumer Reports (June 1996) which stated: "The old Suzuki Samurai had a tendency to tip over in sharp turns – so much that we rated it Not Acceptable when we tested it in 1988. Because of that experience, instituted an additional, tighter emergency-avoidance test for SUVs. All four vehicles in this month's report passed that test and all our other handling tests without incident."

33. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in August 1996, when CU issued a Fundraising Card, captioned, "T.I.P.s," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/ Consumer Reports." (ca. August 1996) and bearing a photograph depicting a Suzuki Samurai tipped up on outriggers.

33. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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34. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU distributed a videotape to television news media that depicts a Suzuki Samurai tipping up on outriggers, filmed on or about May 12, 1988.	34. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
35. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU distributed at a press conference a Background Paper, "Consumer Reports' Avoidance Maneuver" which stated: "In 1988, we developed the 'short course' because we discovered that the Suzuki Samurai, then undergoing testing, showed a propensity to roll over during our long course AM maneuver."	35. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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36. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU published and distributed the the press an article, "How the two SUVs failed our avoidance test" which stated: "Since 1988, when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically, and it would have rolled over without our outriggers. We rated it Not Acceptable."	36. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
37. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU distributed to the press an article, "Not Acceptable: Isuzu Trooper/Acura SLX" ("pre-press copy.") which	37. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	
38. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice on August 20, 1996, when CU stated at a press conference: "[T]hese outriggers have little or no effect on the performance of the vehicle. . . ." "The first time we saw this problem [of rollover] was in 1988 with the Suzuki Samurai." "We evaluated the Suzuki Samurai in 1988. That was the first car we had ever seen that went up on two wheels like this, and we called it Not Acceptable."	38. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

39. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice, when, in an interview of CU representatives by MSNBC on August 20, 1996, CU representatives stated: "In the last eight years, since we have been running this particular short course [i.e., the modified maneuver], only two cars have gone on two wheels like this. One was the Suzuki Samurai in 1988. . . . We issued a warning. We rated that car Not Acceptable. It did the same thing the Trooper did. . . . In the intervening eight years, 46 other cars have gone through with no problem."	39. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
40. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice when it published Consumer Union, Petition for Rulemaking,	40. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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Defect Investigation and Appropriate Enforcement to NHTSA, dated Aug. 20, 1996 which stated: "Since it found in its 1988 tests a similar rollover propensity of the Suzuki Samurai, Consumers Union has tested 47 other sport-utility vehicles, light trucks and minivans under these same conditions. The Isuzu Trooper/Acura SLX twins are the first since the 1988 tests to demonstrate this propensity to a degree that Consumers Union has judged the vehicles 'Not Acceptable.'" The "pre-press" copies of the "Not Acceptable" and "How the two SUVs failed our avoidance test" articles, described above, were attached to the Petition.

41. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in October 1996, when CU published an article, "Special Report. SUV Safety. Not

41. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) Acceptable. Isuzu Trooper/ Acura SLX," Consumer Reports (Oct. 1996) which stated: "As a result of our tests, we've rated the 1995 and 1996 Isuzu Trooper and the 1996 Acura SLX Not Acceptable. The last time we rated a vehicle Not Acceptable was in 1988, when the Suzuki Samurai, a small SUV, exhibited a similar rollover tendency in these same tests."	
42. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in October 1996 when CU published an article, "How the two SUVs failed our avoidance test," Consumer Reports (Oct. 1996) which stated: "Since 1988, when we inaugurated the short course, only two other SUVs have exhibited this [rollover] problem. The 1988 Suzuki Samurai lifted two wheels suddenly and dramatically,	42. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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and it would have rolled over without our outriggers. We rated it Not Acceptable."

43. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in October 1996, when CU issued a Fundraising Card, captioned, "T.I.P.s.," bearing legends, "Suzuki Samurai, 1988," and "Consumers Union/ Consumer Reports." (ca. October 1996) and bearing a photograph depicting a Suzuki Samurai tipped up on outriggers.	43. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
44. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1996, when CU published a column, "Memo to Members," Consumer Reports which stated: "One of the SUVs that failed [the avoidance maneuver] was the Suzuki Samurai in 1988."	44. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

45. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1996, when CU published Electronic Files, Review of Suzuki Samurai, model years 1987 through 1995, in Consumer Reports Cars; The Essential Guide For Buyers and Owners From America's #1 Consumer Test Center, 1997 Edition (CD-ROM) which stated: "Rated Not Acceptable because of its tendency to roll over during a hard turn."	45. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
46. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in January 1997, when CU published on the Web "Timeline," which stated: "Summer 1988: "While subjecting the Suzuki Samurai sport-utility vehicle (SUV) to the Consumers Union avoidance-maneuver test,	46. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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the vehicle tips up on two wheels (without safety outriggers) and threatens to overturn. In order to evaluate rollover propensity, CU shortens the length of the course slightly and makes the turning angle sharper, as it would be in a suburban or urban driving situation. The Samurai tips up severely and repeatedly (with safety outriggers), although three other SUVs remain stable throughout this 'short course' avoidance-maneuver test. As a result of its dangerous performance, Consumer Reports rates the Suzuki Samurai 'Not Acceptable' in its July 1988 issue."

"Rhoda H. Karpatkin, CU's president [said,] 'From the start, we have been convinced that Suzuki's meritless claims are an effort to prevent us from continuing to speak out when we find a car is unsafe. We remain committed to testing cars and informing the public fully and objectively about their safety and performance.'"

47. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in July 1997, when CU issued a Press Release, "Auto Safety Agency Fails Again to Tackle Rollover Hazard," which stated: "In 1988, and again in 1996, NHTSA turned down petitions to investigate the Suzuki Samurai, a vehicle that showed serious rollover problem in our tests, and that has been involved in 147 deaths and some 7000 injuries." "Since 1988, we have tested 57 sport utility vehicles, minivans, and compact trucks on our special emergency-handling course, and only the Trooper, the Acura SLX, the Suzuki Samurai, and the Bronco II have shown a significant tendency to tip." "Consumer Union has been testing cars for over 60 years. Our work has stood the test of time and the scrutiny of the marketplace: Tens of millions	47. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

(Cont'd)

of American consumers have found our automobile information reliable, and justifiably so. When we find a major safety problem in a car which happens rarely we take it very seriously, and do everything we can to alert consumers. We have also done our best to get the government to take appropriate steps. The government's failure to act on the Trooper/SLX and other highly rollover prone vehicles is a serious failure, and a disservice to consumers. We are independent and objective. We stand by our tests, and will continue to alert the public to the safety problem these vehicles pose."

48. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in July 1997, when CU published on the World Wide Web, "Auto Safety Agency Fails Again to Tackl [sic] Rollover Hazard," <http:// www.consumer.org/

48. *Anderson v. Liberty Lobby, Inc.*; 477 U.S. 251, 257 (1986).

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(Cont'd) cunhtsa.html> (since ca. July 25, 1997) which state: [Same as press release]	
49. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in July 1997, when CU published on the World Wide Web, "Auto Safety Agency Fails Again to Tackle Rollover Hazard," <http:// www. prnewswire.com/> at Company News On Call: Consumer Reports/ Consumers Union which stated: [Same as press release]	49. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).
50. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in September 1997, when CU published a Column, "Frontlines. Safety Update. Government Won't Investigate Isuzu Trooper," Consumer Reports (Sept. 1997) which stated: "Since 1988 we have	50. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the Suzuki Samurai showed such a marked tendency to tip . . .

". . . in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."

51. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in September 1997, when CU published "Government Won't Investigate Isuzu Trooper," <www.consumerreports.org/Categories/Cars Trucks/

51. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) Reports/9709trop.htm>, Consumer Reports Online (since ca. Sept. 1997), which stated: "Since 1988 we have published reports on 57 sport-utility vehicles, minivans and compact trucks that were put through our special emergency-handling course. Only the Trooper, the Acura SLX and the Suzuki Samurai showed such a marked tendency to tip . . . ". . . in 1988 and again in 1996, NHTSA turned down petitions from others (not Consumers Union) to investigate the Suzuki Samurai, a vehicle that showed a serious rollover problem in our tests, and that has been involved in some 147 deaths and some 7,000 injuries."	
52. Suzuki cannot establish by clear and convincing evidence that CU acted with actual malice in November 1997, when CU published	52. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986).

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(Cont'd) an Article, "How Safe Are SUVs?,: Consumer Reports 60 (Nov. 1997) which stated: "Of the 61 SUVs, minivans, and pickup trucks we've tested in the last nine years, only two SUVs have tipped up so severely that we judged them Not Acceptable: the 1988 Suzuki Samurai and the 1995-96 Isuzu Trooper and its twin, the 1996 Acura SLX."		
53. Suzuki cannot prove its claim for product disparagement.	53. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986); Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7. *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986); *Guess v. Superior Court*, 176 Cal.App.3d 473, 479 (1986); *Leonardini v. Shell Oil Co.*, 216 Cal.App.ed 547, 572 (1989).	

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54. Suzuki cannot prove its claim for violation of California Business & Professions Code § 17200.	54. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 251, 257 (1986); Order Granting Defendant's Motion to Dismiss; Order Permitting Filing of Amended Complaint dated February 3, 1997, 4:1-7, 20:19-28; *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 1041-1045 (1986).

Dated: May 24, 2000

JUDGE ALICEMARIE H. STOTLER
UNITED STATES DISTRICT COURT

SUBMITTED BY:

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APPENDIX E — WARNING: THE SUZUKI ROLLS OVER TOO EASILY, SECTION: VOL. 53, NO. 7; PG. 424, COPYRIGHT 1988 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, JULY 1988

HIGHLIGHT:

The Jeep Wrangler, the Jeep Cherokee, and the Isuzu Trooper got through our emergency turns. The Suzuki Samurai flunked.

BODY:

"No auto since the VW beetle has created such a sensation. Large real-estate developers, career women, surf bums and college students are having a ball in today's cult car, the Suzuki Samurai. They're painting them pink and dressing them up with chrome wheels, fog lamps and spare tire covers. And they're cruising everywhere with the top down in their four-wheel-drive baby jeeps. . . ." – Marketing & Media Decisions

Early this year a staff member was driving our new Suzuki Samurai slowly, in second gear, along a snow-covered dirt road leading to our auto test track when he felt the tires grab in a rut worn by earlier traffic. The driver turned the wheel to the right to steer clear. The front wheels pulled out of the rut and climbed approximately six inches up a ridge of plowed snow at the side of the road. Then, as the driver tried to straighten the wheels, the Suzuki flopped over on its side.

The driver climbed out uninjured, but with new respect for the laws of physics.

Appendix E

The laws of physics say a vehicle with a high center of gravity is more likely to roll over than a vehicle with a low center of gravity. All four-wheel-drive utility vehicles have a higher center of gravity than passenger cars, a consequence of the extra ground clearance needed when driving on rough terrain rather than a paved road.

The laws of physics say a narrow vehicle with a high center of gravity is more likely to roll over than a wider vehicle with a high center of gravity. The Suzuki Samurai is one of the narrowest vehicles on the road. Its "tread" width – the distance from the center of the left front wheel to the center of the right front wheel – measures only 51.2 inches.

A short narrow vehicle with a high center of gravity is more likely to roll over than a longer narrow vehicle with a high center of gravity. The Suzuki Samurai is also one of the shortest vehicles on the road, only 80 inches between the centers of the front and rear wheels.

Finally, a light vehicle is more likely to tip over than a heavy vehicle, other things being equal. The Suzuki weighs 950 pounds less than the Jeep Wrangler, the small utility vehicle that's closest to it in general configuration. It weighs 1220 pounds less than the Jeep Cherokee and 1590 pounds less than the Isuzu Trooper II, the two larger utility vehicles tested for this report.

Given their physical characteristics, it's not surprising that utility vehicles roll over two to three times more frequently than do passenger cars. Nor is it surprising that the fatality rate among occupants of small utility vehicles is

more than double that of small passenger cars and small pickup trucks, the second most hazardous types of vehicle.

When the Insurance Institute for Highway Safety analyzed auto-accident fatalities in one- to three-year-old cars and trucks for the years 1981 to 1985, it found that occupants of small utility vehicles were being killed at the rate of 5.7 for every 10,000 vehicles registered. For small passenger cars and small pickups, the rate was about 2.4 deaths per 10,000; for large cars, about 1.2 deaths per 10,000.

The Suzuki Samurai was not marketed in the U.S. during the years those accident fatalities were occurring. However, it is rapidly compiling mortality statistics all its own.

The Center for Auto Safety, a nonprofit consumer group, says it has received reports of 20 Suzuki Samurai rollover accidents resulting in 21 injuries and four deaths. It has also received reports of six rollovers in variants of the Samurai, such as the Suzuki SJ410, which is sold in Hawaii and the Virgin Islands; those resulted in seven injuries and one death. The National Highway Traffic Safety Administration has received 44 reports of Samurai rollovers, resulting in 16 deaths.

That's an ominous record of rollovers, considering that there are only 150,000 Samurais on U.S. roads so far, and that many of them have been in use for less than a year.

The physical characteristics of four-wheel-drive utility vehicles, the accident statistics, and our own experience were very much on the minds of our auto testers as they prepared

to run the Suzuki Samurai, the Jeep Wrangler, the Isuzu Trooper II, and the Jeep Cherokee through their paces.

Our regular test program includes a maneuver designed to see how controllable a car remains when a driver is forced to steer sharply – to avoid, say, a child who unexpectedly darted into the road. To simulate that kind of sudden emergency, our drivers run each car through a lane-changing course marked off by traffic cones. One cone blocks the right-hand lane, a stand-in for the obstacle to be avoided. The drivers begin their left turn out of the lane 60 feet before the obstacle. They then must steer sharply enough to get back into the lane no more than 60 feet beyond the obstacle.

Our test drivers take the cars through the course at increasingly higher speeds, noting how fast they can swerve around the obstacle without knocking over cones and without losing control.

The cars get the benefit of the doubt in this test. We run the test on dry pavement with expert drivers who've steered through the course hundreds of times before. The drivers don't brake while steering, as a nonprofessional driver might in an emergency, so the cars aren't forced into premature skids or spins. Nor do they accelerate. This "accident-avoidance maneuver" realistically simulates a situation that could confront any driver any day. We never attempt unrealistic stunts, such as U-turns at high speeds.

Most vehicles weave through the course easily up to about 50 mph, then start hitting cones or skidding at some point above 50 mph. During the 10 years we've used this

test, no vehicle we've tested – and these have included many vans and small trucks with high centers of gravity – has threatened to roll over.

Under the experienced touch of our drivers, all four utility vehicles got through the course at 52 mph or better. The Suzuki Samurai was actually more maneuverable than the others, since it's so much smaller and lighter.

With concern about a potential rollover somewhat allayed, a staff member who does not normally drive the course tried to steer the Suzuki around the obstacle. All went well for several runs at moderate speed. Then, on a run at 45 mph, the driver made a slight steering misjudgment: He turned wider than necessary to clear the obstacle, something many ordinary drivers might do in an emergency turn. That forced him to turn back a bit more sharply than our regular testers had. As he turned the steering wheel to the right to get back into lane, the Suzuki teetered to the left. The two right-side tires lifted about a foot off the pavement before the driver was able to bring the vehicle back under control.

The Suzuki had come within a hair of rolling over at a moderate speed in a maneuver that shouldn't put daylight under the tires of any car. A poor-handling car might skid or spin when turned sharply at these speeds. That's hazardous enough. But a rollover at moderate or high speed would very likely injure or kill the occupants. A rollover in an open vehicle, such as the Suzuki featured in the company's "fun" commercials aimed at young people, is especially deadly.

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Would the other utility vehicles show similar instability if steered the way the Suzuki had been steered?

To find out, we put all the vehicles through a slightly different maneuver. We realigned the cones so that our test drivers had to start the turn 50 feet from the obstacle instead of 60 feet from it. That meant they needed to steer around the obstacle and back into lane in a total of 110 feet rather than the usual 120 feet. We also moved the obstacle three feet farther to the left.

As a result of those changes, our drivers would have to sharpen their turns a little.

For this test, we equipped the two small vehicles, the Suzuki Samurai and the Jeep Wrangler, with the outriggers shown in the photos. If one of them tipped during the test, the outriggers would contact the road first and keep the vehicle from landing on its side. (The outriggers also added about 300 pounds, making the Suzuki and the Jeep Wrangler somewhat harder to roll than they normally would be.)

In this more demanding test, the Isuzu Trooper, the Jeep Wrangler, and the Jeep Cherokee began knocking over cones at about 40 mph. But they remained stable. We also tried the Jeep Wrangler without the outriggers. Still stable.

The Suzuki Samurai, by contrast, toppled onto the outriggers when turned through the course at about 40 mph. Without the outriggers, it would have rolled over.

During the period we were testing these vehicles, Suzuki introduced a modified version of the Samurai, a "1988 1/2"

model with a softened suspension. We acquired the latest version and ran it through the same accident-avoidance maneuver. It proved even less stable than the Samurai we originally tested. The front right wheel lifted in turns at low speed. And the vehicle rolled onto the outriggers at 38 mph.

In our judgment, the Suzuki Samurai is so likely to roll over during a maneuver that could be demanded of any car at any time that it is unfit for its intended use. We therefore judge it Not Acceptable.

A rollover in a Suzuki Samurai would be even more dangerous than a rollover in a passenger car. Utility vehicles such as the Suzuki are not required to meet Federal safety standards for side-impact and rollover protection, which cover only passenger cars. Although widely advertised, sold, and used as a passenger car – indeed, as a car in which "to have a ball," as the advertising trade press puts it – the Suzuki we tested has no rollbar to reinforce its hardtop, as the Jeep Wrangler does.

Soon after our tests were complete, we called the results to the attention of the National Highway Traffic Safety Administration, in an effort to warn those who might have been considering a Suzuki before this issue of CONSUMER REPORTS came out. We have also petitioned NHTSA to establish minimum stability standards for all vehicles, so that cars and trucks as tippy as the Suzuki Samurai can no longer be sold here.

Unfortunately, NHTSA, a reluctant watchdog, has already denied a similar petition filed last year by

Sen. Timothy Wirth (D., Colo.). Senator Wirth based his petition on the fatality record of past vehicles whose physical characteristics indicated potential instability; we base ours on test results.

Senator Wirth also asked for a defect investigation and possible recall of vehicles with a potential to roll. In April, NHTSA denied that petition as well, saying such an investigation would be costly and time-consuming. Instead, it plans to issue a pamphlet on the safe use of utility vehicles.

But if reading material is the answer, Suzuki and other manufacturers already provide it. The cars all carry warning stickers mandated by law. Suzuki's sticker, attached to the inside of the driver's door, reads as follows:

Warning: "This is a multi-purpose vehicle which will handle and maneuver differently from an ordinary passenger car, in driving conditions which may occur on streets and highways and off-road. As with other vehicles of this type, if you make sharp turns or abrupt maneuvers, the vehicle may rollover or may go out of control and crash. You should read driving guidelines and instructions in the owner's manual, and WEAR YOUR SEATBELTS AT ALL TIMES."

Such stickers may help Suzuki defend against the liability suits that are already coming its way. But the Government agency responsible for auto safety should not be content with stickers or with some pamphlet as a substitute for safe design. It's doubtful that those youngsters shown tooling down to the local soda fountain in one of Suzuki's commercials will take the time to read a label or a pamphlet when they confront their first sudden turn.

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The Center for Auto Safety has filed a more specific petition, asking for a defect investigation and recall of all Suzuki Samurais. We support that petition. Unfortunately, the Samurai is not hazardous as a result of a defect that can be fixed. The design itself is hazardous, combining a high center of gravity with a narrow tread width, a short wheel base, and light weight. A true consumer-protection agency would require Suzuki to buy its product back from the consumers it has put at risk.

Unlike the Suzuki, the other three utility vehicles purchased for this report are not unreasonably hazardous. The bigger ones, the Jeep Cherokee and the Izuzu Trooper II, are the equivalent of mid-sized passenger cars. We equipped them the way the typical buyer would, with automatic transmission, power steering, air-conditioning, and other common options. We chose the optional six-cylinder engine for the Cherokee, since the vast majority of them are sold that way. A Six isn't available for the 1988 Trooper II; a larger fuel-injected Four is new to the Trooper this year, as is an automatic transmission. So equipped, the Cherokee's list price topped $18,000; the Trooper II reached nearly $16,000.

The Jeep Wrangler, like the Suzuki, is a runabout that appeals to a younger, more adventuresome buyer. To keep the price down, we chose a basic model with few options. Our Wrangler had the standard four-cylinder engine and five-speed manual transmission. We opted for the hard top with full doors rather than the convertible. But even modestly outfitted, it listed for over $12,000. A comparably equipped Samurai lists for about $10,000.

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Part-time four-wheel drive (you can shift in and out of the four-wheel-drive mode) is standard in all these vehicles. Four-wheel drive is intended for use in snow, ice, or mud, or when driving off road. All the vehicles have an additional Low range in four-wheel drive, so they can be driven slowly over demanding terrain and yet retain sufficient power to climb steep grades.

As we've noted above, "sport/utility" vehicles such as these need not conform to a number of important safety regulations that apply to passenger cars. They are exempt not only from regulations that specify the crush-resistance of the roof and resistance to side impacts but from those that require head restraints for front-seat occupants, eye-level brake lights, and automatic safety-belt systems. Nor need they conform to any standards for bumper protection. We did not perform our bumper tests with these vehicles. Because their bumpers are higher than those on passenger cars, our bumper basher would pass under them, just as a passenger car's bumper would. Our examination indicated, however, that the bumpers and the vehicles' adjacent body structure would probably be damaged severely in a 5-mph collision.

Jeep Cherokee

Tested car. Four-door, four-wheel drive, $13,150 list. Standard equipment includes 2.5-liter Four, four-speed manual transmission, Command-Trac part-time 4WD system, power brakes, and tinted glass. Major options in our car: 4-liter fuel-injected Six, automatic over-drive transmission, air-conditioning, power steering, tilt steering column, console with armrest, roof rack, and Pioneer package (including stereo

radio, gauge package, rear-window wiper/washer, and upgraded interior trim). List price, as equipped: $ 18,070, including destination charge.

Other styles. Four-wheel drive: Two-door, $ 12,538; Sport, $ 13,727; Limited, $ 22,260. Four-door Limited, $23,153. Two-wheel drive: Two-door, $ 11,186; Sport, $12,265. Four-door, $ 11,798.

Engine and transmission

Starting/running. Excellent. Flawless under all conditions.

Acceleration. Excellent. Strong.

Transmission. Very Good. Occasional abrupt downshifts. The transmission can be set for Power or Comfort to adjust shifting to suit driving conditions. We found the difference in behavior too subtle to be of use. The Command-Trac four-wheel-drive-system can be engaged at any time simply by pulling a lever; the front hubs lock automatically.

Economy. Fair. The Cherokee's relatively large size and big engine took a toll on fuel mileage. Expect around 18 mpg, overall, in two-wheel drive.

Handling and braking

Routine handling. Good. Not up to that of most two-wheel-drive family wagons or sedans. The Cherokee responded quickly, but its power steering felt vague. In turns,

the vehicle often stepped to one side when its wheels encountered bumpy or broken pavement.

Emergency handling. Good. Predictable, but sluggish and vague in abrupt avoidance maneuvers. Steady, but a bit sloppy and numb-feeling in hard turns at the track.

Braking. Very Good. Because the front brakes locked early, controlled stopping distances were somewhat long. The parking brake is conveniently located between the front seats.

Ride and noise

Ride. Fair. On all but smooth main roads, the Cherokee subjected riders to abrupt pitching and unusually large rocking motions. The worse the road, the greater the discomfort. The ride was only slightly worse with a full load.

Noise. Fair. On the highway, wind and road noise were louder than in an equivalent passenger car.

Seating accommodations

Driving position. Good. The driver's seat is too low. No matter how we fiddled with the "rocking chair" adjustment (a unique Renault design), we were unable to find a comfortable driving position. The steering wheel is too close to the driver; the tilt steering column ($124) didn't help. The accelerator is too far left, and all the pedals are too close to a tall driver.

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Front seating. Good. Bucket seats from the Renault Alliance seem inappropriate here. Contours and upholstery friction offer some side support, but there's insufficient thigh and lower-back support. The seatback-angle lever was difficult to operate. These seats are a $59 option with the Pioneer and Chief packages and $134 extra in the base model.

Rear seating. Fair. The bench seat is about as welcoming as a park bench: It's hard and flat. There's enough knee room and head room in back for six-foot-tall riders. Three average-sized men can ride in back, but not in comfort. The seat doesn't extend the full width of the vehicle, and hard plastic trim at the base of the roof pillars jabs outboard occupants. There's stiff competition for foot space.

Climate control

Heating. Very Good. Slow to warm but eventually torrid. Spotty warm-air distribution. The fan was noisy. Ducts deliver warm air to rear-seat occupants. Bilevel failed to provide warm air below, cooler air above. Competent defrosting. The rear-window washer/wiper ($144) was very useful in sloppy weather; the rear defroster ($158) is a necessity in most climes. Our car lacked the latter, and it was sorely missed.

Ventilation. Excellent. Ample. Air can be fan forced and warmed as needed.

Air-conditioning. Excellent. The integrated unit in this model ($820) has manual controls but operates automatically in Defrost and Bilevel above about 30 degrees F to help keep the inside of the windows fog-free on cool, damp days.

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Convenience

Controls. Excellent. Old-fashioned looking but functional. There's no flash feature that enables the headlights to be used as a "silent horn" in the daytime. The egg-shaped switch for the heater fan is awkward to position. There are several convenient bins and trays in the center console.

Displays. Excellent. Clearly labeled and well lit at night. We could do with less glitter and chrome.

Cargo area. Excellent. Versatile and convenient. The rear seat can be folded down easily to increase cargo capacity. The liftgate raises up out of the way for convenient loading. In all but the basic model, the cargo area is nicely finished with carpeting and sidewall trim. The compact, limited-service spare tire mounts upright behind the left rear wheel housing, where it's out of the way yet accessible. A conventional spare ($58) fits in the same location.

The Cherokee can tow 5000 pounds if it's equipped with towing package B ($237) and with a six-cylinder engine, automatic transmission, heavy-duty cooling system, and other equipment.

Servicing. Good. The heavy hood is a challenge to prop up, and some routinely serviced items are awkward to check. The brake-fluid reservoir is opaque, so its cover must be removed to see the level. Chrysler has upgraded the powertrain warranty to three years or 36,000-miles. The basic warranty remains one year or 12,000 miles; rust-through, three years with unlimited mileage.

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Safety and reliability

Safety. Comfortable front belts provide moderate tension on the riders' shoulder and a snug fit at the hips (or around a child safety seat). There are no shoulder belts in the rear seat. All three lap belts can secure a child safety seat. Tether anchors are provided. The rear doors do not have child-proof locks.

Although not required by safety standards, there are front-seat head restraints in the Cherokee, and they're amply tall even when fully lowered. Driver view is quite good, especially when compared with that of most passenger cars. The fuel tank is close to the rear bumper, a much more vulnerable location than that used in passenger cars.

The Government has not crash-tested a Jeep Cherokee recently, and there are no plans to do so this year.

Reliability. Poor. Since its introduction in 1984, the Cherokee has compiled a much-worse-than-average record.

A whopping 17 sample defects ranged from a troublesome shift linkage adjustment that made key extraction difficult to a skimpy paint job. Others: a clunk in the driveline whenever we stepped off and back on the throttle, a clock that quit working, poor radio reception, and on and on.

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Isuzu Trooper II

Tested car. Four-door XS, $13,439 list. Standard equipment includes 2.6-liter, fuel-injected Four, five-speed manual transmission, part-time 4WD, power steering, power brakes, underbody skid plates, full gauges, aluminum wheels, rear-window defroster and wiper/washer, and stereo radio. Major options in our car: automatic overdrive transmission, air-conditioning, and roof rack. List price as equipped: $15,790, including destination charge.

Other styles. Two-door S, $11,909; XS, $12,909. Four-door S, $12,639; LS, $14,799.

Engine and transmission

Starting/running. Excellent. Unfailing.

Acceleration. Very Good. Adequate most of the time, but a bit sluggish when the vehicle was loaded with people or cargo.

Transmission. Very Good. Generally smooth shifting, but indecisive when trying to maintain speed on hills. The Normal and Power settings used to change the shifting characteristics according to driving conditions were more effective than those in the Cherokee. To use four-wheel drive, you must lock the front hubs manually before getting into the car, by twisting a knob at the center of each wheel - not a pleasant task in nasty weather. (Troopers equipped with a manual transmission have automatic-locking hubs.)

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Economy. Fair. Comparable to the Cherokee, but with a much lower level of performance. Expect to average about 19 mpg in two-wheel drive.

Handling and braking

Routine handling. Good. Generally competent, but when the Trooper rocked over bumpy rural roads it sometimes veered slightly off course. Cross winds moved the vehicle around quite a bit. With a full load aboard, the vehicle yawed disconcertingly when we changed lanes quickly on expressways.

Emergency handling. Fair. Unsteady in emergency maneuvers. In abrupt maneuvers, the Trooper leaned so sharply that its suspension bottomed on the outside of the turn. When that happened, the vehicle skated out a bit before the front wheels grabbed and brought the vehicle back into the turn. The sensation was unnerving, but our drivers controlled the Trooper safely through the pylon course – albeit at a lower speed than the others.

Brakes. Excellent. Remarkably short stops for such an ungainly vehicle. But the brakes were touchy, so it was a challenge to control the severity of those stops. The parking brake, a cane-handled stick, pulls out from under the dash.

Ride and noise

Ride. Fair. Somewhat harsh and jittery on expressways. A rough rider, with sharp bounding and tossing, on average secondary roads. Painful on rougher back roads. A full load

made the motions larger, more abrupt, and mostly uncontrolled.

Noise. Fair. About the same as the Cherokee, with significant wind and road noise.

Seating accommodations

Driving position. Very Good. The driver's seat has a height adjustment, so just about all drivers were able to sit quite comfortably, with an excellent view out. Tall drivers may find the pedals too close and the accelerator too vertical. When our shortest driver moved the seat fully forward, it interfered with cranking the window.

Front seating. Very Good. High, firm seats – a bit too firm for some. The seatbacks are adjustable, but the recliner levers are hard to find and operate. Upholstery is cloth and vinyl. Access is easy for tall individuals, a hike for shorter people.

Rear seating. Good. Roomy for two, cramped for three. The firm, flat seat makes no concessions to the human anatomy.

Climate control

Heating. Fair. Almost impossible to regulate. Heat was either off or on: None or too much. Distribution was uneven. There are no ducts to direct heat to the rear. (A rear-seat heater is $300 extra.) The Bilevel setting, which runs the air-conditioner, gave temperature stratification to an extreme,

often spewing icy air from the dash vents, scorching air from the floor registers. A rear-window wiper/washer and defogger are standard in the XS and LS, $ 200 additional in the S.

Ventilation. Excellent. Ample. Fresh air can be fan forced, heated, or both, as needed.

Air-conditioning. Excellent. The $ 850 integrated air-conditioner operates automatically in Defrost to help keep the windows free of fog during cool, damp weather.

Convenience

Controls. Very Good. Essentially functional. Small complaints: The headlight switch is too close under the steering wheel; the wiper switch (on the turn-signal lever) turns opposite to convention; and the radio is mounted low and is difficult to tune. There are several convenient bins, cubbies, and door pockets to stow small items.

Displays. Very Good. The oil-pressure, fuel, and engine-temperature gauges are in the center of the dashboard, away from the driver's direct line of sight. Reflections make them hard to read in the daytime.

Cargo area. Excellent. Roomy and exceptionally accessible. The rear opening consists of two doors, a large one on the left, on which the full-service spare tire is mounted, that opens and closes like any car door, and a smaller one on the right that's held closed by a small catch at the bottom. The area is nicely finished, but small cubbies or

bins would be a welcome addition. Folding down the rear seat to expand the cargo area is an awkward job, but worth the effort.

Trailer-towing capacity is 2000 pounds.

Servicing. Very Good. Fairly handy, but access to the engine coolant drain is limited, and the engine-oil and transmission-fluid dipsticks are similar looking and very close to one another. Warranties: basic, one year or 12,000 miles; powertrain, two years or 24,000 miles; rust-through, three years with unlimited mileage.

Safety and reliability

Safety. The front safety belts are easy to put on and comfortable. The outboard rear seats have lap-and-shoulder belts. The shoulder belts require a locking clip for a child safety seat. The center lap belt works as is. The rear doors and the cargo door have child-safe locks. The transmission shifter isn't interlocked with the ignition key: If you fail to shift into park or set the parking brake, the vehicle could roll away.

The front-seat head restraints are amply tall. Driver view to the rear is marred by the spare tire on the left rear cargo door and the bar between the rear door windows. The fuel tank is close to the rear bumper, but is protected by a steel plate.

A 1985 Trooper II didn't perform well in the Government's crash tests. Injuries to the driver dummy were severe; to the passenger, fatal.

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Reliability. Good. Data for the 1985 and 1986 model years indicate an average record.

Several sample defects were serious, and three were potentially crippling. The spark plugs were finger tight. Engine oil dripped from the loose oil filter. Water entered the steering column past a defective seal, so the steering bound up with ice on winter mornings. The bolts attaching the rear seat to the floor were loose.

Jeep Wrangler

Tested car. Two-door convertible, $ 10,595 list. Standard equipment includes 2.5-liter, fuel-injected Four, five-speed manual transmission, Command-Trac part-time 4WD, power brakes, full gauges, and tinted windshield. Major options in our car: hard top with full doors, power steering; conventional spare tire, extra-capacity fuel tank, and stereo radio. List price, as equipped: $12,263, including destination charge.

Other styles. Two-door convertible S, $8995; Sahara, $11,995; Laredo, $13,395.

Engine and transmission

Starting/running. Excellent. The engine cranked slowly, but it always started and ran well.

Acceleration. Good. Just adequate. The engine was extremely noisy and harsh during acceleration. The optional 4.2-liter Six ($386) has about the same horsepower as the Four, but considerably more pulling power.

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Transmission. Good. Stiff shifting when cold. Fifth gear delivered weak response on the highway. The Wrangler can be shifted into four-wheel drive at the tug of a lever when driving at any legal speed; the front hubs lock and unlock automatically.

Economy. Fair. No better than the larger, heavier vehicles with their automatic transmissions. Expect to average about 19 mpg in two-wheel drive.

Handling and braking

Routine handling. Fair. Oddly sensitive power steering, combining abrupt response (often more than we wanted or intended) with virtually no road feel. The Wrangler stayed very level in turns, but it was quite vulnerable to wind on the highway. On bumpy back roads the stiff suspension caused many small, quick rocking motions that made the vehicle feel as though it were darting from side to side.

Emergency handling. Fair. Tricky. Our drivers said unskilled drivers could find the Wrangler difficult to handle in an emergency. But in all our tests, the vehicle stayed level. It showed no tendency to lift two wheels or roll over. It did fishtail rather easily. The overly sensitive power steering noted in normal handling was less of a problem in hard turns at the test track.

Braking. Good. Unimpressive. It wasn't easy to control the severity of stops and, in many, the vehicle weaved from side to side. The foot-operated parking brake is unsuitable with the manual transmission.

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Ride and noise

Ride. Poor. Ride comfort ranged from annoying on the smoothest roads to punishing on rough roads. The Wrangler can snap and jerk occupants painfully – at times with eye-blurring speed. A full load did not affect the ride.

Noise. Poor. A half-hour ride on the highway, with ceaseless road, wind, and engine noise, was an exhausting safari. The Wrangler's bare fiberglass top and bare metal rear floor amplified the noise.

Seating accommodations

Driving position. Fair. The seat is low and the steering wheel high. The pedals are crowded to the left. Some drivers stepped on the brake when intending to depress the clutch. While tall drivers found the pedals too close to the seat, our shortest driver had to stretch to depress the clutch. The parking brake is squeezed between the clutch and the door. It's awkwardly high, too.

Front seating. Good. The individual seats provided little support, and the rigidly straight seatbacks aren't adjustable. The textured vinyl upholstery is unpleasantly sticky, especially in warm weather. The exceptionally high, channel-shaped doorsills tripped just about everyone entering and leaving the car, and there are no door checks.

Rear seating. Poor. The tiny bench barely accommodates two average-sized men, and it makes no pretenses about providing support. It feels as flat as it looks. Tall riders had

plenty of head room but insufficient knee room. Feet became entangled and shoes scarred by the sharp linkages under the front seats. Rear riders are captives of those in front: The levers that enable the front seats to be moved for exiting passengers are inaccessible from the rear seat.

Climate control

Heating. Good. The heater provided enough warmth, but slowly (especially in freezing weather) and unevenly. There's no Bilevel setting. Windshield defrosting was satisfactory, but there are no side-window defrosters. A timed-cycle rear-window defroster is $161 extra on the hardtop. A rear-window washer/wiper is not available, although sorely needed to clear road grime that quickly accumulates in sloppy weather.

Ventilation. Poor. A little fresh air wafts in only when the car is moving. It can't be heated.

Air-conditioning. Not tested. Not available with the four-cylinder engine; $861 with the Six. It isn't integrated with the climate-control system. It can only recirculate cabin air.

Convenience

Controls. Good. The instrument panel looks as though the controls were thrown at it and mounted wherever they stuck. The headlight rocker switch is low, recessed, and difficult to see and reach. The panel-light dimmer is obscure. The headlights can't be flashed as a daytime "silent horn." The climate controls are low-mounted and stiff. The radio is far from the driver.

Displays. Fair. Gauges are stretched across the dashboard, some so far away they're hard to see. Daytime reflections and weak lighting at night don't help.

Cargo area. Good. Minimal in size and finish. There's room for little more than a small suitcase behind the rear seat. The rear seat folds (but not easily) to expand capacity. There's nothing to secure the seat in its folded position so it falls backward when the vehicle begins moving. Luggage rattles around on painted metal: There's no carpeting, no plastic trim. The lower door opens like a conventional car door; the upper windowed door opens like a hatch lid. Both are well out of the way for easy loading. The limited-service spare tire mounts on the outside of the lower door. A full-service spare is $109.

Trailer-towing capacity is 2000 pounds.

Servicing. Good. Except for the opaque brake-fluid reservoir in the engine compartment, all is pretty straightforward. Getting into the engine compartment is not: two stubborn external latches must be pulled and the safety catch released before the hood can be propped open. Warranties: basic, one year or 12,000 miles; powertrain, three years or 36,000 miles; rust-through, three years with unlimited mileage.

Safety and reliability

Safety. The front safety belts are comfortable to wear, if a bit inconvenient to reach. The rear seat has lap belts only.

They're awkward to put on and, since they're always falling on the floor, they can be difficult to find. Both rear belts will secure a child seat.

The high, bulbous hood and the rear-mounted spare tire interfere with the driver's view. The windshield wipers park at a 45-degree angle, a distraction. The front seats' integral head restraints are adequately tall. The fuel tank is just forward of the rear end, but has a steel plate protecting it. All Wranglers have a braced steel roll-over bar inside the cabin. It is not mounted directly to the frame; we can't say whether it's adequate or not.

In Government crash tests of a 1987 Wrangler, injury to the driver dummy was moderate; to the passenger, severe or fatal.

Reliability. No data; new model. Other Jeeps have had a generally poor record.

Just three sample defects. The front wheels were out of alignment. And there were a few exterior finish and interior trim flaws.

Suzuki Samurai

Tested car. 1988 Two-door hardtop Deluxe I, $8995 list. Standard equipment includes 1.3-liter Four, five-speed manual transmission, part-time 4WD, power brakes, rear-window defroster, cloth interior and carpet, and stereo radio. Major options in our car: none. List price, as equipped: $9235, including destination charge.

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Other styles. Two-door convertible Standard, $ 7995; Deluxe I, $8695; Deluxe II, $8945. Two-door hardtop Standard, $8905; Deluxe II, $8995. 1988 1/2 models are priced as follows: Two-door convertible Standard, $ 8495; Deluxe, $9195. Two-door hardtop Standard, $ 8595; Deluxe, $9495.

Engine and transmission

Starting/running. Good. Often stalled after being started and while warming up. The engine sagged and hesitated even when fully warm.

Acceleration. Fair. Weak. More noise than power.

Transmission. Good. Lots of shifting was required to maintain speed on uphill surfaces. The front wheel hubs must be manually locked to use four-wheel drive.

Economy. Very Good. Respectable, but with a marginal level of performance. Expect about 28 mpg overall in two-wheel driving. The 1988 1/2 Samurai has a different fifth gear ratio that provides more response.

Handling and braking

Routine handling. Poor. Sluggish, heavy, and vague. The Samurai didn't track well. We noticed disconcerting wandering in the wake of passing trucks and in crosswinds. Sharp bumps made the steering wheel kick in the driver's hands. On occasion, the vibration was so severe that the front wheels skittered to the side.

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Emergency handling. Not acceptable.

Braking. Excellent. Very short stops.

Ride and noise

Ride. Poor. We cannot recall testing a vehicle that rode as poorly. There were unrelenting small, choppy pitches, even on smooth expressways. As roads worsened, the ride became painful. Fully loaded, the car was just as bad. The 1988 1/2 model has softer front springs that provided a less sharp but more bouncy ride.

Noise. Poor. Too noisy. Highway travelling brought on a discordant din of wind, engine, and road noise.

Seating accommodations

Driving position. Fair. Tall drivers found the pedals too close to the seat and the accelerator too far left. Most drivers found the steering wheel too high; some found the seat too low.

Front seating. Fair. The firm individual seats were shy on thigh and lower-back support, especially for tall occupants. Adjustable seatbacks. Cloth upholstery. You have to hold the doors open as you climb in and out of the vehicle; there are no door checks.

Rear seating. Poor. Passengers must perch on a tiny bench and place their feet atop a high and broad floor pan. There are no foot wells.

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Climate control

Heating. Fair. Two choices: hot or cold. Temperature was nearly impossible to modulate and distribution was spotty. Output was adequate down to about 10 degrees F. A crude Bilevel setting gives ambient air above and hot air below. Defrosting was satisfactory, but the rear defroster (standard on the Deluxe I and II hardtops, not available on the Standard) worked slowly.

Ventilation. Good. The noisy fan forces enough fresh air. The temperature can't be adjusted.

Air-conditioning. Not tested. Standard on the Deluxe II. The air-conditioner, which can be activated in any mode by pressing a button, delivers only recirculated cabin air.

Convenience

Controls. Good. They're in hiding: the climate controls, behind the windshield wiper lever and the steering wheel; the rear defroster switch, behind the steering wheel; the hood release, buried in the glove compartment. The radio controls aren't hidden, but there's no light to illuminate them at night. The turn-signal lever has a very weak lane-change detent.

Displays. Very Good. The instruments have only fair contrast. Reflections are a problem in the daytime.

Cargo area. Fair. Very small, but easily expandable. The single rear door, which opens wide and out of the way, and the low sill make loading easy. The floor is flat and

carpeted, but sharp edges on the folded rear seat could damage luggage. The full-service spare tire mounts conveniently on the outside of the rear door.

Trailer-towing is limited to 1000 pounds.

Servicing. Excellent. Straightforward. Warranties: basic, one year or 12,000 miles; powertrain, 2 years or 24,000 miles; rust perforation, three years with unlimited mileage. The hood on the Wrangler and Samurai can be opened 90 degrees for improved service access.

Safety and reliability

Safety. The front safety belts are comfortable and easy to put on, but they often get caught in the door when they are unbuckled. Both rear lap belts can secure a child safety seat; the front passenger belt requires a locking clip.

Driver view is good except for the wide center pillar. The front-seat head restraints are adequately tall. The fuel tank is in a vulnerable location in the rear, but it does have a steel plate. The hardtop Samurai lacks a roll bar; the open version has one, but we can't attest to its strength.

In Government crash tests, the driver dummy in a 1986 Samurai received possibly severe injuries; the passenger fared somewhat better. In the test, the right-rear portion of the hood came through the windshield a small distance.

Reliability. No data, new model.

Our Samurai exhibited six defects attributable to sloppy assembly or incomplete dealer preparation. The front wheels were misaligned and out of balance. The outside mirrors would not hold their adjustment. The tires were overinflated. Finish flaws, which we tally as just one defect, were legion.

RECOMMENDATIONS

The Jeep Cherokee and the Isuzu Trooper II are designed to function as family-sized passenger cars as well as go-anywhere four-wheel-drive vehicles. Of the two, the Cherokee feels a bit more like an ordinary station wagon. Its four-wheel-drive system works simply and easily. It is, however, more expensive than the Trooper and, according to owners surveyed, likely to be more troublesome.

The Trooper is larger, taller, and more trucklike in feel, and it can carry more than the Cherokee. If you must have an automatic transmission, prepare to deal with the inconvenience of manually locking the Trooper's front wheel hubs whenever you want to shift into four-wheel drive. We think that's a great disadvantage, but avoidable if you purchase a Trooper with a manual transmission.

Other competing vehicles in this class include the Chevrolet S-10 Blazer and the Ford Bronco II (last tested in 1984). Neither is available in a four-door version, a serious omission in this family-wagon class. And neither offers the passenger accommodations or cargo volume of the Trooper, or is likely to be as reliable.

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The Jeep Wrangler is in another class entirely. It doesn't pretend to be a comfortable people-mover or a capable cargo-carrier. In the basic model we tested, it's a crude vehicle, very noisy and hard-riding. But it does what it is supposed to do as a simple on-and-off-road utility vehicle. Its handling is well below that of the average passenger car. We believe it could be a handful for the average driver, particularly in emergency maneuvers. The Wrangler's repair record is likely to be worse than average.

The Suzuki Samurai, of course, is all the craze in small jeeplike vehicles. In our opinion, its behavior in emergency maneuvers, is all a rational buyer needs to know about this car. But we found it wretched in most other respects as well.

APPENDIX F — FOLLOW UP: SOME SUZUKI ROLLOVERS, SECTION: VOL. 53, NO. 8; PG. 487, COPYRIGHT 1988 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, AUGUST, 1988

HIGHLIGHT:

New accident statistics and reader reports underline the vehicle's hazard.

BODY:

Last month, we rated the Suzuki Samurai Not Acceptable because we found it dangerously prone to roll over when turned sharply to steer around an obstacle - a child who runs into the road, for example, or another car backing out of a driveway. Such a situation confronted 25-year-old Jacquelyn Kay Langworthy on June 9, 1987, while she was driving her Suzuki Samurai to work on 18 Mile Road in Gowen, Mich. According to the police accident report, Langworthy was driving in a 55-mph zone when she swerved to the right to avoid an oncoming car. The Samurai rolled over at least twice, landing 200 feet down the road in a ditch. Langworthy was killed.

The National Highway Traffic Safety Administration (NHTSA) keeps a variety of records of traffic accidents, fatalities, and injuries reported by police and reported directly through its Office of Defects Investigation's auto-safety hotline. As of late June, the Office of Defects Investigation had tallied 67 rollover accidents for the Suzuki Samurai and the Suzuki SJ410, a similar utility vehicle sold abroad and in Hawaii and the Virgin Islands. Those have resulted in 20 deaths and 87 injuries.

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Not all accidents are reported, of course. Most accidents include only property damage, and in some cases, drivers deliberately withhold accident data. For example, 24-year-old David Watson was driving his Suzuki Samurai on Interstate 64 in Memphis, Tenn., he told us, when a truck merged onto the highway, forcing him to shift lanes at about 40 mph. The Samurai went out of control, rolled over, and landed on the passenger side. Watson wasn't injured, so he and his brother-in-law set the car upright and drove away. He didn't report the accident to police or to his insurance company because he didn't want his insurance rates to go up.

At least one set of NHTSA data reflects a significant rollover problem with the Suzuki Samurai. NHTSA's Crash Avoidance Research Data file, a database of all police records filed in six states, shows that in 1986 the Suzuki Samurai rolled over in 64 percent of all single-vehicle Samurai accidents reported in four of those states. This Samurai rollover rate is higher than the rollover rate for the notorious Jeep CJ-5 and CJ-7, two vehicles similar in design to the Samurai, though larger and heavier. The Jeep CJ-5 rolled in 49 percent of its single-vehicle accidents; the Jeep CJ-7, which is 10 inches longer, rolled in 36 percent of its single-vehicle accidents. Some 449 people were killed in accidents involving those Jeeps between 1971 and 1981, according to NHTSA.

Production of the Jeep CJ was discontinued in 1986, when the wider, heavier Jeep Wrangler was introduced. NHTSA has not yet calculated similar rollover statistics for the Wrangler. In our tests, the Wrangler passed the accident-avoidance maneuver's that caused the Samurai to roll, as did the Jeep Cherokee and the Isuzu Trooper II. After our tests were

performed, Consumers' Association of the United Kingdom put the Suzuki Samurai, the Suzuki SJ410, the Toyota Space Cruiser, and the Subaru Justy through identical accident-avoidance maneuvers. The two Suzukis rolled over onto the outriggers added to protect the drivers. The Toyota and Subaru did not.

We find the test results and the statistics compelling evidence that the Suzuki Samurai is an unreasonably hazardous vehicle. The accidents described to us by readers over the past month only underline the hazard.

On July 28, 1987, 18-year-old Kevin Dineen and two friends drove to Long Beach Island, N.J., to play miniature golf. On the way home at about 12:30 A.M., Dineen was exiting the Garden State Parkway in Toms River, N.J., when his Samurai went out of control. The vehicle rolled over several times and landed on the driver's side. Dineen suffered a fractured skull.

On the clear, dry afternoon of July 20, 1987, 19-year-old Ann Marie Ayers was driving at 55 mph on the Long Beach Freeway in Los Angeles when another car cut in front on her. She braked and turned to the left to avoid a collision. Without running off the road or hitting a curb, the Suzuki rolled over. Ayer's arm was pinned and dragged under the car as it slid across 30 feet of pavement. Ayers lost the use of her arm.

On June 15, 1985, 26-year-old William Potter was driving on a two-lane roadway in St. Croix, Virgin Islands. Potter was taking a right turn at about 35 mph when his

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Suzuki SJ410 rolled over and crashed into a wire fence. Potter lost the use of his arms and legs. His lawsuit against Suzuki was settled the night before the trial for "a substantial amount," according to his attorney.

If you have been in an accident involving a Suzuki Samurai, or any other utility vehicle, you should report the case to the following agencies whether or not a police report was filed: Jon White Office of Defects Investigation 400 7th Street, S.W. Washington, D.C. 20590 202 366-4933 Auto Safety Hotline 800 424-9393 outside Washington, D.C. 202 366-0123 in Washington, D.C. Sam Cole Center for Auto Safety 2001 S Street, N.W. Suite 410 Washington, D.C. 20009 202 328-7700

APPENDIX G — GOVERNMENT TO START WORK ON ROLLOVER STANDARD, SECTION: VOL. 53, NO. 11; PG. 702, COPYRIGHT 1988 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, NOVEMBER, 1988

HIGHLIGHT:

But will it ever finish?

BODY:

In response to a petition filed in June by Consumers Union, the National Highway Traffic Safety Administration has begun proceedings "to establish a minimum standard to protect against unreasonable risk of rollover" in a car, van, light truck, or multipurpose passenger vehicle such as the Suzuki Samurai. Consumers Union filed its petition after the Suzuki failed to perform our emergency-avoidance maneuvers at highway speeds without rolling over onto outriggers installed to protect the test drivers (see CONSUMER REPORTS, July 1988).

NHTSA's action, however, does not hold out the promise of protection from this unreasonable hazard anytime soon - perhaps not at all. "The granting of this petition does not necessarily mean that a rule will be issued," NHTSA noted. Even if a rule is eventually issued, the various proceedings leading up to it could take four years or more.

Meanwhile, drivers and passengers in Suzuki Samurais and other vehicles that roll over too easily will continue to run an unreasonable risk of injury and death. At the same time that NHTSA granted CU's petition, it denied a petition

from the Center for Auto Safety asking NHTSA to conduct a defect investigation into the Suzuki's rollover propensity. Such an investigation might have led to the vehicle's recall.

In denying that petition, NHTSA asserted that "the rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles."

According to NHTSA's own Crash Avoidance Research Data file, however, the Suzuki Samurai's rate of rollover in single-vehicle accidents is more than double the average for all sport-utility vehicles. In 1986, the most recent year for which there are figures, the Suzuki rolled over in 64 percent of all single-vehicle Suzuki accidents recorded in this data base. The only vehicle that came close to the Samurai in rollover involvement is the now-discontinued Jeep CJ-5 (49 percent). By contrast, the rollover rate for full-sized sedans was only 8 percent.

NHTSA appears to have relied not on its statistics on rollover rates for single-vehicle accidents but on a different data base, one that includes only rollovers involving a fatality. Elsewhere in its letter denying the Center's petition, it notes that the Samurai was involved in six fatal rollovers per 100,000 vehicles on the road, a record the agency compares favorably with that of the Ford Bronco II - 19 fatal rollovers per 100,000 vehicles on the road.

CU has learned that the overall rollover rate for the Bronco II is high - about the same as that for the Jeep CJ-5 - but not nearly as high as the Suzuki's. The higher number of fatalities in Bronco II rollovers could come about for a

number of reasons. The Suzuki rolled over at a relatively low speed in our accident-avoidance tests; if Bronco II rollovers occurred at higher speeds, one would expect more fatalities per rollover. One would also expect more fatalities if the Bronco II were driven more miles, on average, than the Suzuki.

No matter how you look at the statistics, however, it seems peculiar to argue that the Suzuki should not be investigated because it is no more hazardous than the Bronco II. One would expect an agency concerned with safety to notice that the Bronco II may be at least as hazardous as the Suzuki, and to investigate the rollover propensity of both vehicles.

NHTSA did no independent testing of the Suzuki's rollover propensity. Rather, it uncritically accepted Suzuki's data, saying Suzuki's "demonstrated that the Samurai satisfactorily completed industry accepted . . . tests which might be used to assess a vehicle's rollover propensity."

But there are no industry-accepted tests for rollover propensity - a point NHTSA itself makes elsewhere in its letter to the Center.

A vehicle like the Suzuki is at risk of rollover when it's steered first in one direction and then quickly back - a sudden maneuver that one might have to perform to avoid an obstacle and then return immediately to the proper lane.

One test performed for Suzuki involved driving the Samurai in a circle with a 200-foot diameter at an increasing

speed until the vehicle began to slide. Another involved driving in a circle at a fixed speed, gradually decreasing the circumference of the circle until the vehicle began to slide. Neither test required a change in direction, the maneuver that caused the Samurai to roll over in our tests. More importantly, neither test resembles anything a driver might do on the road; one doesn't drive in circles to avoid an accident. Driving in circles tests the adhesion of tires, not the propensity of a vehicle to roll over.

A third test performed for Suzuki looks superficially like an avoidance maneuver, since the car was run through a slalom course. But in a realistic avoidance maneuver, a car is steered first to the left and then back to the right immediately. In the Suzuki test, the car was steered to the left, then straightened and allowed to recover before returning to the right lane. That is a simple lane-changing maneuver, not an accident-avoidance maneuver.

NHTSA also adopted as its own another of Suzuki's arguments: Using the accident-avoidance maneuver developed by CU, the agency stated, "probably any light utility vehicle could be made to roll over." But NHTSA offered no evidence or independent test results to support such a speculation. In fact, no vehicle other than the Suzuki has rolled over in the 10 years we've tested for accident-avoidance.

APPENDIX H — DID SUZUKI IGNORE WARNINGS ABOUT SAMURAI? COURT PAPERS SAY YES, SECTION: ONCE OVER; VOL. 57, NO. 5; PG. 294, COPYRIGHT 1992 CONSUMERS UNION OF U.S., INC.; CONSUMER REPORTS, MAY, 1992

BODY:

On June 9, 1987, Jacquelyn Kay Langworthy was driving a Suzuki Samurai to work in Gowen, Mich., when an oncoming car crossed into her lane. According to the police accident report, Langworthy swerved to her right to avoid a collision. Her Samurai rolled over at least twice before coming to a stop. Langworthy, age 25, died in the accident.

The following year, when we published the results of our tests of the Samurai, we reported that the vehicle's light weight, high center of gravity, narrow track width, and short wheelbase made it unreasonably prone to roll over in sharp turns. We judged the Samurai Not Acceptable, a step we have rarely taken in our tests of autos.

Our findings should have come as no surprise to Suzuki, it now appears. Documents recently produced in a Georgia court case show that General Motors sounded its own alarm to Suzuki at least four years before CU did. In dismissing Suzuki's defense and ordering sanctions against the company and its attorneys for failing to fully and fairly answer questions or produce documents, Judge B. Avant Edenfield offered this telling chronology.

In a letter dated July 10, 1982, Suzuki Chairman Osamu Suzuki suggested that GM Chairman Roger Smith consider marketing a Suzuki sport-utility vehicle in the U.S. Although

his letter deals primarily with the SJ410, a predecessor of the Samurai, Suzuki also mentions that an improved model could be available in 1985. The new model would be known as the SJ413, or Samurai.

On May 13, 1983, after what it called "considerable test and evaluation" of the SJ410, GM informed Suzuki that it would not market that model because if would require "major modifications [that] would compromise vehicle design and cost."

In a letter to Suzuki dated April 9, 1984, GM detailed its concerns about the new model. "We have continued management discussion on the SJ413 [Samurai] and have reaffirmed Chevrolet's interest in marketing this vehicle," a GM executive wrote, adding that "Chevrolet's concerns are . . . that previously defined engineering matters first be mutually resolved - particularly perceived rollover tendencies which have proven to be a major concern in the U.S. market."

Judge Edenfield concluded, "The GM materials suggest that Suzuki was aware that the SJ410 had a propensity to roll over, and that Suzuki knew that certain design changes were necessary to correct this problem. By showing that Suzuki did not change these design features before producing the Samurai and marketing it in the United States, it appears that the Plaintiffs will have a strong argument for punitive damages."

Suzuki's lawyers initially claimed there was no evidence that GM ever sent those letters, which the plaintiff's attorneys had obtained from GM. The court said it "simply does not

find it credible that no one at Suzuki was aware of the communications." Suzuki, meanwhile, is appealing the judge's decision.

The National Highway Traffic Safety Administration, a reluctant Federal watchdog, acknowledges that the Samurai has a high rollover rate, but it has refused to call the vehicle defective and order a recall. The agency has only recently begun work on standards to address rollover problems for all vehicles. CU petitioned the agency for such standards in 1988.

Eventually, that may lead to improvements in the design of sport-utility vehicles. Meanwhile, there are still too many hazardous Suzuki Samurais on U.S. roads.

APPENDIX I — MEMORANDUM OF WINIFRED CONKLING TO IRWIN LANDAU DATED SEPTEMBER 19, 1988

Re: Suzuki Samurai Follow-up II
cc: Bob Knoll and David Pittle

MEMO

The following is a paragraph by paragraph response to

(1) the National Highway Traffic Safety Administration's denial of the Center for Auto Safety petition for a recall of the Suzuki Samurai and

(2) NHTSA's letter granting CU's petition for rulemaking to establish a minimum rollover standard.

Appendix I

DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration
Denial of Motor Vehicle Defect Petitions;
CFAS/Cole, SFCM/Sack

This notice sets forth the reasons for the denial of a petition submitted to NHTSA under section 124 of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1381 *et seq.*).

In February 1988, Mr. Samuel H. Cole of the Center for Auto Safety (CFAS) petitioned the NWSA to conduct a defect investigation into the alleged rollover propensity of the Suzuki Samurai and Suzuki "variants" of the Samurai, the SJ410 and LJ80 vehicles. In July 1988, Sylvan H. Sack of the Safety First Club of Maryland also petitioned the agency to open a defect investigation and recall of the Suzuki Samurai and its variants.

Both petitions for a defect investigation are denied. The rollover crash involvement of the Samurai appears to be within the range of most other light utility vehicles. Rollovers where they have occurred often appear to have been influenced by adverse driver and environmental factors such as high risk driving maneuvers, drinking, low ambient light, and lack of driver familiarity either (sic) the vehicle or the road.

NHTSA has based its denial on the premise that the rollover rate for the Suzuki Samurai is within the range of other light utility vehicles. This is wrong.

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According to NHTSA's CARDFile data, 64 percent of all singlevehicle Samurai accidents involve rollovers. That's more than twice the average for sport-utility vehicles (30 percent). Rollover rates for other vehicles are: 49 percent for the CJ-5, 36 percent for the CJ-7, 30 percent for the Ford Bronco (NOTE: Figures for the Ford Bronco II, which is more prone to rollover, have not been calculated), 24 percent for the Chevy S-10 Blazer, 15 percent for the average small passenger car, and 8 percent for average full-sized sedan.

It should also be noted that the rollover figures for the Samurai may be deceptively low. As we reported in the July Consumer Reports article on the Samurai, a substantial number of Suzuki rollovers go unreported. The Samurai is lighter than other sport utility vehicles, and some drivers set their overturned Samurais upright and drive away without reporting the accidents.

NHTSA states that adverse driver and environmental factors "influenced" the number of Samurai rollovers. Adverse conditions do not cause rollovers. Samurai advertising targets young, inexperienced drivers who may be more likely to drive under the influence of alcohol or try high-risk maneuvers. That may explain a higher than normal accident rate, but it does not explain the higher than normal rollover rate.

There were 192,126 Suzuki Samurai, SJ410 and LJ80 vehicles sold in the U.S. from August 1980 through March, 1988, of which less than 16,000 vehicles were the SJ410 and LT80 models. The SJ410 and the LJ80 were sold from

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August 1980 through 1985 in Hawaii, Puerto Rico, and the Virgin Islands, but not in the continental U.S. The Samurai was first introduced it April 1985, with the convertible or soft top bodystyle accounting for most of the vehicle sales (80 percent). The SJ410 and L780 vehicles were predecessors of the Samurai and were sold without a roll bar or stabilizer bar which are standard-equipment in the Samurai.

There are 113 reported rollovers, 91 involving the Samurai, 15 involving the SJ410, 5 involving the LJ80, and 2 are unknown Suzuki vehicles. Thirteen of the vehicles are reported to be hardtops, 62 are convertibles, and the remaining are not identified. These reported rollovers involve 120 injuries and 25 fatalities. The report sources include CFAS, Suzuki, NHTSA's Fatal Accident Reporting System (FARS), and the public.

> *We have no choice but to assume the NHTSA figures are accurate reflection of reported rollovers, but, as we've already noted, an unknown number of Samurai rollovers are not reported.*

The average time of ownership prior to a rollover was less than 8 months, ranging from 2 to 15 months. Rollovers involved young drivers (73 percent were 25 years old or younger). Alcohol usage was found in approximately 50 percent of the police-reported rollovers. The driver was cited by police for a traffic offense in 50 percent of the police reports. The rollover was also likely to occur at night (58 percent) on a weekend (55 percent) California was found to have twice the number of rollovers as any other state (20 percent versus 9 percent for Florida). Occupant ejection

was involved in all fatal first event rollovers and most serious injury rollovers. In most instances it appears that ejection may have been prevented had the safety belts been used at the time of the rollover. Multiple-vehicle crashes accounted for 10 of the rollovers. Only one report involved a rollover which took place entirely off-road (a SJ410 vehicle).

> *The fact that a great number of Samurai rollovers involve young drivers who have owned their vehicles for less than one year comes as no surprise. The vehicle is marketed to first-time, low-income drivers.*
>
> *A 1983 NHTSA study concluded that drivers who are unfamiliar with their cars are two to three times more likely to be involved in accidents. People who have driven a vehicle less than 500 miles are involved in 12 to 17 percent of all accidents; people who have driven a vehicle less than 1000 miles are involved in 17 to 24 percent of all accidents. The critical factor is a driver's experience with a given car, not a driver's total driving experience.*
>
> *Unfortunately, NHTSA has not done research on average time of ownership, driver age, alcohol use, driver error, or seat belt use for other vehicles with high rollover rates. NHTSA did a special study of the Samurai; comparable data is not available for other make/model comparisons.*

A comparison of the Samurai rollover experience to peer light utility vehicles was made using the 1987 Fatal Accident Reporting System (FARS) file. The comparison was made

based on normalized vehicle populations of 1986-1987 model light utility vehicles with at least 25 fatal crashes in the FARS file; the Ford Bronco II, the General Motors Corporation S-10 Blazer/S-15 Jimmy, and the Jeep Cherokee/Wagoneer vehicles. The Bronco II (approximately 19 per 100,000 vehicles) was found to have more than 3 times the first event rollover (the rollover was not subsequent to a collision or impact) involvement as the Samurai. The Samurai had a first event rollover involvement (approximately 6 per 100,000), but exceeded the Cherokee first event rollover (approximately 2.5 per 100,000) involvment.

> *NHTSA is playing with the numbers. The discussion has gone from rollover rates to fatality rates. These figures show that more people die in Ford Bronco II rollovers than in Suzuki Samurai rollovers. This is interesting, but it has nothing to do with rollover propensity. The Bronco II rollover fatality rate may be higher because the accidents are more severe, or because people drive their Broncos more miles than they drive their Samurais, or because of some structural difference between the vehicles. The fatality rate can be influenced by a number of factors.*

For the class of vehicles and in particular for the Suzuki Samurai, the vehicle operator appears to be a major factor in light utility vehicle rollovers. The lack of utility vehicle driving experience exhibited by the Suzuki drivers (and demonstrated in ODI's previous investigation of Jeep CJ-5 vehicle rollover) and other contributing factors identified in the crash analysis indicate that the driver's familiarity with the vehicle appears to be the most important factor in the

occurrence of a the (sic) rollover event. The Samurai's relatively short wheel base, narrow track width, and low mass may make it more maneuverable, which may be beneficial for accident avoidance. However, such characteristic may increase the chance that inexperienced drivers when reacting to an unexpected event, may oversteer or over correct the vehicle inducing a high lateral acceleration which can result in a rollover. The likelihood of a rollover is dependent on a variety of conditions present at the moment such as vehicle condition, road/ground surface, topography, and vehicle speed.

> *NHTSA's claim that "the driver's familiarity with the vehicle appears to be the most important factor in the occurrence of a the (sic) rollover event" contradicts another NHTSA report. In a NHTSA report titled "Analysis of the Relationship Between Vehicle Rollover Stability and Rollover Risk Using the NHTSA CARDFile Accident Database," the authors conclude that "the overwhelming variable in explaining rollover rate variations as a function of vehicle make/model designation, is the vehicle rollover stability factor." NHTSA initially refused to release this paper, but it is now a public document.*

The Samurai was found to have a static stability factor (ratio of the half track width to center of gravity height) higher than most other light utility vehicles when empty. The Samurai ranges from 1.08 to 1.13. The class of light utility vehicles ranges from approximately 1.03 to 1.22. The stability factor has been shown to have a positive statistical relationship to the likelihood or a vehicle rolling over in an

accident, although other factors such as wheel base and tire traction are also involved. Those vehicles with higher stability factors tend to have lower rollover in a crash. The Samurai's center of gravity height increase by more than 3 inches with 4 adult (150 pounds each) occupants, causing the stability factor to decrease approximately 13 percent. As the vehicle load is increased, the stability factor decreases, because the center of gravity of the low mass Samurai is readily affected by the added mass and the location of that mass in the vehicle. This effect is even more pronounced in the convertible or soft top bodystyle. However, even when loaded the Samurai stability factor remains within the range of light utility vehicles.

What this paragraph doesn't say is that the Samurai's is center of gravity is more affected by load than other sport-utility vehicles.

FYI: In CU's test of the Samurai, the outriggers actually lowered the center of gravity by 0.28 inches, making the Samurai <u>less</u> prone to rollover.

NBC News, Consumers Union, and Suzuki all conducted dynamic vehicle testing to assess the rollover propensity of the Samurai. NBC News and Consumers Union were able to demonstrate some rollover propensity. However these test were apparently not well instrumented and were not recorded for analysis. Suzuki's testing demonstrated that the Samurai (and its variants the SJ410 and LJ80) satisfactorily completed industry accepted (such as Society of Automotive Engineers and International Standards Organization) tests which might be used to assess a vehicles rollover propensity. Suzuki also

attempted to replicate the Consumers Union double lane change, obstacle avoidance maneuver. In the replication, Suzuki was able to induce tip-up unto (sic) the outriggers with both an Isuzu Trooper II (one the of the models used in the Consumers Union test), and a Samurai at speeds at which the vehicles also successfully traversed the course, although the course may have been less stringent than the Consumer's Union course. The Suzuki tests were instrumented so that steering angle, lateral acceleration, roll angle and yaw rate could be recorded. There appears to have been sufficient latitude to allow a driver, either knowingly or unknowingly, to influence the testing without readily being detected by the available instrumentation.

First, it should be noted that NHTSA conducted no dynamic tests of its own. It relied on Suzuki's data entirely. It should also be noted that NHTSA never asked CU to share its data or test procedures

NHTSA's charge that CU's tests were "not well instrumented and were not recorded for analysis" is an attempt to invalidate the test results. CU's used external instruments to measure vehicle speed and the tests were videotaped for analysis. Internal instrumentation was not necessary—anyone could see that the Samurai tipped over during the tests.

NHTSA seems to have accepted that Suzuki has "satisfactorily completed industry accepted tests" for rollover propensity. However, no such rollover tests exist. (That's why CU petitioned NHTSA to develop a rollover stability test and standard.)

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Suzuki did run the Samurai through several tests. One involved driving the Samurai in a circle with a 200-foot diameter at an increasing speed until the vehicle began sliding. Another involved driving in a circle at a fixed speed, gradually decreasing the circumference of the circule until the vehicle began to slide. Neither tests involves steering reversal, the maneuver that caused the Samurai to roll.

In a third test, the Samurai was driven back and forth between pylons at a steady speed. In the final test, the Samurai was taken through a lane change—the vehicle changed lanes, recovered, then returned to the starting lane. This test simulated passing a vehicle on the road, not an abrupt accident-avoidance maneuver.

Basically, these tests measure tire adhesion more than rollover propensity. According to Bob Knoll, there would be more difference in test results from one brand of tire to another than from one vehicle to another.

Suzuki claims it "passed" these tests. No congratulations necessary, there's no way to fail. There are no accepted performance criteria for any of these "industry approved" tests.

NHTSA also cites the results of Suzuki's attempt to replicate CU's tests. NHTSA notes that "the course may have been less stringent than the Consumer's Union course" but neither Suzuki nor NHTSA mention any reason for a change in the course. CU provided Suzuki with the exact test procedure.

Appendix 1

Finally, NHTSA implies that because CU's test vehicles were not internally instrumented CU's drivers could have influenced the test results. NHTSA does not acknowledge that CU repeats its tests several times with several drivers to minimize the possibility of driver bias.

The existing test procedures for assessing the rollover propensity of vehicles are unsatisfactory because they do not provide for repeatable, reproducible results, and there are no accepted performance criteria. The testing appears to rely on the skill and influence of the driver and the presumption that the vehicle suspension, tire, and road surface characteristics will remain constant throughout the testing. At present there is no standard, accepted test or series of test procedures and performance requirements which accurately predict a vehicle's rollover propensity.

Since analysis of the reported crash data does not show that the Samurai have been involved in a greater rate of rollovers than comparable other vehicles, there does not appear to be a basis for expecting the further investigation would reveal a significant number of failures in performance or manufacturing safety defect trend. In addition, the known performance test and measure of vehicle characteristics such as the stability factor are not sufficiently reliable or discriminating among vehicles to identify a defect in construction, components, or materials that would contribute to the propensity or Samurai vehicles to roll over. Moreover, to the extent that such tests or measures have been applied, they do not convincingly identify the Samurai as more likely to be involved in rollover accidents than other light utility vehicles. A further commitment of investigative resources

does not appear likely to result in the gathering of evidence of significant numbers of failures or in development of tests or measures or other analysis that would support a defect determination. There does not appear to be a reasonable possibility that an investigation would result in an order to Suzuki to recall the vehicles.

Once again, NHTSA's CARDFile date does show that the Samurai's rollover rate is higher than other sport-utility vehicles.

NHTSA's claim that it does not expect to identify "a defect in construction, components, or materials that would contribute to the propensity of Samurai vehicle to roll over" comes as no surprise The problem is with vehicle design.

NHTSA's conclusion that "there does not appear to be a reasonable possibility that an investigation would result in an order to Suzuki to recall the vehicles" is indicative of the organization's impotence. As we will point out in the upcoming Consumer Reports article on recalls, under the current administration NHTSA refuses to pursue investigations that are not likely to result in "easy" recalls.

Other issues in addition to the rollover propensity issue are the rollover integrity of the vehicles and the survival of the occupants after a rollover. Analysis of the crash data does not suggest that the Samurai structure fails to protect occupants who remain in the vehicle. However, the Samurai convertible or soft tops with the roll bar assembly withstood

the rollover forces better than the hardtop versions without the rollbar.

This paragraph raise the issue of import classification. Because the Samurai is usually imported as a truck, it does not have to meet the same safety standards (including roof integrity) as a passenger car. Details on the import issue were included in the first collection of Suzuki material. (I have more information if you want it.)

The Consumers Union and the NBC News testing results are cause for some concern, but the test procedures do not have a scientific basis and cannot be linked to real-world crash avoidance needs, or actual crash data. Using the same procedures, probably any light utility vehicle could be made to roll over under the right conditions and driver input. The agency has embarked on a research program to investigate rollover propensity and will study handling tests and performance criteria that can be used for rulemaking as well as defect investigation purposes.

CU's test do have a scientific basis and are linked to real-world crash avoidance needs. The lays of physics apply to all vehicles whether or not they are internally instrumented. You don't need to know the lateral acceleration or yaw rate to know that a vehicle is turning on its side. CU's accident-avoidance maneuver was far more realistic than Suzuki's tests of driving in circles and weaving in and out of pylons.

Appendix 1

Letter to Kristen Rand, CU/Washington office

The purpose of this letter is to notify you that the National Highway Traffic Safety Administration (NHTSA) has decided to grant the petition of June 2, 1988, by the Consumers Union of United States, Inc. (Consumers Union) to initiate rulemaking proceedings to establish a minimum standard to protect against unreasonable risk of rollover.

The agency believes the issues raised by Consumers Union warrant further consideration. Because NHTSA has already initiated research into the issue of the rollover safety of all light duty vehicles, including passenger cars, light trucks, van and multipurpose passenger vehicles, to determine whether rulemaking is appropriate, we have granted your petition. A summary of the ongoing and planned research is included in the enclosed table. The results of NHTSA'a research investigations will yield information on the issues raised by your petition, and that information will be used to determine whether further rulemaking is appropriate.

> *NHTSA started its rollover research in late 1987. Felrice claims the Suzuki Samurai rollover issue had nothing to do with NHTSA's plans to conduct research on the rollover problem.*

As you have noted, this agency has recently denied a petition for rulemaking to establish a safety standard limiting the rollover propensity of light duty vehicles. We denied that petition for several reasons, including our determination that establishing the specific minimum stability factor requested in the petition would be too narrow an approach

to the complex rollover problem. Your petition, however, does not purport to isolate a single cause of rollover. In fact, it acknowledges that there are "factors other than a vehicles' stability factor (which) play a role in rollover causation." We believe that granting your petition is consistent with the steps we have taken to address the problem.

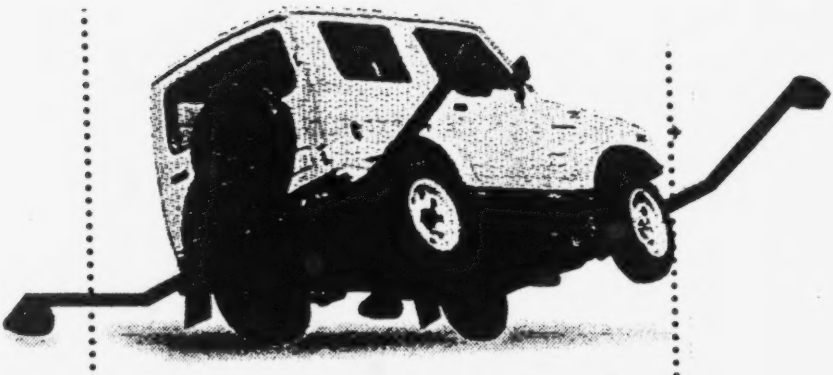
The granting of this petition does not necessarily mean that a rule will be issued. Based on the results of the agency's research and analysis of other available information, the determination of whether to issue a rule will be made in the course of the rulemaking proceedings, in accordance with statutory criteria.

According to Felrice, rulemaking usually takes from two to six years. He estimated that the rollover rulemaking would take about four years.

NHTSA's claim that "using the same (CU) procedures, probably any light utility vehicle could be made to roll over" has trot been true in CU's experience. Three other sport-utility vehicles were taken through the same accident-avoidance test as the Samurai and none showed a propensity to rollover.

George L. Parker
Associate Administrator
for Enforcement

APPENDIX J — EXCERPT FROM 60TH ANNIVERSARY EDITION OF CONSUMER REPORTS



1986 CU buys its own auto test track in rural Connecticut. Two years later, based on tests conducted there, CONSUMER REPORTS discovers the Suzuki Samurai easily rolls over in turns and rates it Not Acceptable. Sales of the Samurai dwindle away. Since 1936, dozens of products, from chemistry sets and toasters to power mowers and child safety seats, have been identified as safety hazards and rated Not Acceptable.